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No. 88-____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

INTERTRIBAL COUNCIL OF NEVADA, INC.,
Petitioners

v.

DONALD HODEL, individually and as Secretary
of the Interior of the United States of
America, and THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Inter-Tribal Council of Nevada, Inc. (the Council) has standing to demand petition for forfeiture of the Stewart Indian School lands because the Council and its individual member tribes are former beneficial owners under 25 U.S.C. § 293a.

2. Whether the Council has standing to pursue this action under 28 U.S.C. § 1331, 1362 and 25 U.S.C. § 443a.

3. Whether the Council has standing under the Administrative Procedure Act 25 U.S.C. § 702 to request review of a violation of the Bureau of Indian Affairs manual.

4. Whether the State of Nevada has violated the conditions of transfer.

LIST OF ALL PARTIES

The Inter-Tribal Council of Nevada, Inc., whose members are: Battle Mountain Band Council, Carson Colony Community Council, Dresslerville Community Council, Duck Valley Shoshone-Paiute Business Council, Duckwater Shoshone Tribal Council, Elko Band Council, Ely Colony Council, Fallon Business Council, Ft. McDermitt Paiute-Shoshone Tribes, Goshute Band Council, Las Vegas Paiute Tribal Council, Lovelock Tribal Council, Moapa Business Council, Pyramid Lake Tribal Council, Reno-Sparks Tribal Council, South Fort Bank Council, Summit Lake Paiute Council, Te-Moak Tribal Council, Walker River Paiute Tribal Council, Tribal Council of Washoe Tribe of Nevada and California, Wells Band

Council, Winnemucca Colony Council, Woodfords Community Council, Yerington Paiute Tribal Council, Yomba Tribal Council,

Petitioners,

v.

Donald Hodel, individually and as Secretary of the Interior of the United States of America, and the State of Nevada.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Peter J. Sferrazza, on behalf of the Inter-Trial Council of Nevada, Inc. petitions for a Writ of Certiorari to review the judment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra, 1a - 16a) is reported at 856 Fed.2d 1344 (9th Cir. 1988). The opinions of the district court (Appendix C, infra, 18a - 22a) 592 F.Supp. 1297 (1984) and Appendix D, infra, 23a - 41a.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988. Petition for rehearing was denied on December 21, 1988. (Appendix B, infra 17a) The petition for rehearing was timely filed pursuant to Rule 20.4. The time for filing a Petition for Writ of Certiorari is 90 days from the date of denial of the petition for rehearing, which was December 21, 1988, and therefore the Petition for Writ of Certiorari is due on March 20,

1989. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21(f) the statutory provisions involved are cited below and their pertinent text is set forth in Appendix E (infra, 42a - 55a).

1. 5 U.S.C. § 701, 702, 704, 706.
2. 25 U.S.C. § 293a, 443a.
3. 28 U.S.C. § 1331, 1362
4. 18 U.S.C. § 1151
5. 43 B.I.A.M., Supplement § 11.19
6. Nevada Legislative Act of 1887.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Originally this was an action to enjoin both the Federal government and the State of Nevada from proceeding with the proposed transfer of federal lands and

buildings formerly comprising the Stewart Indian School in Ormsby County, Nevada. A writ of preliminary injunction was denied and the transfer was effected by a Quitclaim Deed, executed on July 21, 1982. Thereafter, the case proceeded on an Amended Complaint seeking forefeiture of the transfer pursuant to 25 U.S.C.§ 293a, which authorizes a former beneficial owner who is either an individual Indian or an Indian Tribe to petition for forfeiture if the grantee fails for a period of one year to observe the provisions of the transfer agreement.

B. SUMMARY OF PROCEEDINGS BEFORE THE DISTRICT COURT

Upon learning of the intended transfer of approximately 50 acres comprising the former buildings and land of the Stewart

Indian School, the Council filed action on June 10, 1982, seeking to enjoin the proposed transfer on grounds that it violated the provisions of 25 U.S.C. § 293a, the National Historic Preservation Act, the Bureau of Indian Affairs Manual, the Administrative Procedures Act, and for want of congressional authorization to retrocede jurisdiction to the State of Nevada after acceptance of jurisdiction pursuant to Article I, Section 8, Clause 17 of the U.S. Constitution.

On July 21, 1982, the Secretary of the Interior signed a Quitclaim Deed ceding the Stewart Indian School Building Complex to the State of Nevada.

On July 22, 1982, the district court denied Petitioner's motion for a writ of preliminary injunction because it did not

appear at the time that Petitioner's would prevail on the merits. Petitioner filed an interlocutory appeal from the denial of the writ, but later decided to forego the appeal and wait for trial and judgment on the merits, because the property had already been deeded to the State of Nevada.

The respondents moved to dismiss the action for lack of standing and for failure to state a claim for relief because the property had already been transferred. In a memorandum opinion and order entered September 26, 1984, the district court held that its former opinion that petitioner was not the beneficial owner and not an Indian tribe within the meaning of 25 U.S.C. § 293a was probably erroneous. The court said:

> After further reflection the court believes this conclusion was probably erroneous and the plaintiff Inter-Tribal council should be considered to be the appropriate representative of the Indian tribes, if any, deemed to be the beneficial owners of the Stewart Indian School property. Therefore, the plaintiff has standing to represent the rights of the Indians or Indian tribes in any litigation within the jurisdiction of this court. Great Lakes Inter-Tribal Council, Inc., v. Voight, 309 F.Supp. 60 (W.D.Wis. 1970). Memorandum opinion of September 26, 1984.

The district court, however, in the same order, dismissed the first five causes of action on grounds of sovereign immunity both for the United States and the State of Nevada. With respect to petitioner's sixth cause of action, pursuant to the forfeiture provisions of 25 U.S.C.§ 293a, the court held that the State of Nevada has waived its sovereign immunity and petitioner was

granted leave to file an amended complaint naming the Secretary of the Interior and the State of Nevada as the sole parties defendant and stating a claim for relief under 25 U.S.C. § 293a.

An amended complaint was filed on October 17, 1984, and tried to the court on December 9 and 10, 1986.

Believing that the order of September 26, 1984, was the law of the case on the issue of standing which was raised in the motions to dismiss, petitioner rested its case without presenting evidence nor arguing the issue of standing.

On March 10, 1987, judgment was entered against the petitioner, and for defendants, on the grounds that:

1. Petitioner lacked standing to

maintain the action under 25 U.S.C. § 293a, because it is not a "former beneficial owner" as construed by the court; and

2. The court finds that defendant State of Nevada has reasonably complied with the terms and conditions of the Quitclaim Deed.

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES

The Inter-Tribal Council of Nevada, Inc. (the Council), petitioner, is a federally recognized band of Indian tribes with a governing body consisting of the tribal chairmen of all the twenty-three (23) Indian tribes in the State of Nevada. It receives funds directly from the Federal government as an eligible Indian group.

The Stewart Indian School located in Ormsby County, Nevada, was established in

1888 and had served all the Indian children of Nevada and neighboring states until 1980, when federal funding ceased and the school was closed. The school complex was found eligible as an historic building by the Keeper of the National Register of Historic Places in September, 1981, and in February, 1982, it was nominated by the State of Nevada to be included on the register and was granted that status in 1982. The Secretary of the Interior is specifically charged with the administration of the National Historic Preservation Act of 1966, as amended.

By an Act of January 25, 1887, the Nevada State Legislature provided for the establishment of an Indian school in Ormsby County. The Act created an Indian school

commission and authorized the issuance of bonds in the amount $10,000. Section 8 of the Act provides:

> All lands purchased under the provisions of the Act shall be conveyed to said Indian School Commission in trust for the benefit of such school, and in case the United States will accept the lands so purchased and make appropriations for the support of such shool, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

By the same Act of 1887, Nevada ceded jurisdiction of the State of Nevada over all lands conveyed to the United States under the Act for Indian school purposes and further provided that the faith of the State of Nevada was solemnly pledged that the Act would never be repealed.

In the Appropriations Act of 1888, the Stewart Indian School was funded with $25,000.00 and the School was constructed on a 240 acre ranch southeast of the State capitol, Carson City, Nevada. The funds were donated by the State of Nevada to the United States through the Bureau of Indian Affairs.

The Indian school commission purchased part of the school property from a Mr. Wright, but his conveyance was not accepted by the United States. Thereafter, the United States obtained deeds directly from the owners upon payment by the Indian school commission and Ormsby county.

The Stewart Indian School was closed in 1980; and in September, 1981, in a meeting among representatives of the Nevada Indian tribes, the Nevada Congressional delegation and then Deputy Secretary Roy Sampsel, it was announced that as

announced that as between the State of Nevada and the Nevada Indian tribes, the Stewart Indian School property would be awarded to whoever submitted the best adaptive use plan.

On May 4, 1982, the Council, on behalf of all the Nevada Indian tribes, submitted its application to the Secretary of the Interior, including in it an adaptive use plan prepared by Kent Seavey. Mr. Seavey is a recognized and duly accredited expert and authority on historic buildings and their preservation and maintenance. This application was rejected by a letter dated June 1, 1982, to Josephine Gonzales, then executive director of the Council. The letter was from the Assistant Secretary of Indian Affairs, and stated:

> While the Council's proposal is meritorious, we regret that this department does not have the necessary legislative authority to permit an administrative transfer as requested.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted in this case because there is an apparent conflict. The U. S. Court of Appeals has rendered a decision in conflict with a decision of a state court of last resort, pursuant to Rule 17.1(a). The court in this case refused to address the issue of whether or not the Indian school lands in this case were Indian country and therefore held in trust by the United States for the benefit of the tribes served by the school. In C.M.G. v. State, 594 P.2d 798 (Okla. 1979) the highest court of the State of Oklahoma held that lands set apart for an Indian school were Indian country. That case is in conflict with United States v. Myers, 206 Fed. 387 (8th Cir. 1913), which was followed by the district court in this case.

It is critical in the instant case for the Supreme Court to determine whether an Indian school is Indian country and therefore held in trust by the United States for the benefit of the tribes it serves.

The second reason this court should grant the petition is that the district court held that the Secretary of the Interior does not have to comply with the Bureau of Indian Affairs manual in determining who was eligible to receive the Stewart Indian school lands, the State of Nevada or the Inter-Tribal Council of Nevada. The court of appeals held that the Council did not have standing to challenge the violation of the BIAM by the Secretary of the Interior pursuant to the Administrative Procedure Act. This is a direct violation of this Court's decision in Morton v. Ruiz, 415

U.S. 199, 94 S.Ct. 1055 at 1074, 39 L.Ed.2d 270 (1974), where the Court recognized that:

> Before the BIA can extinguish the entitlement of these otherwise eligible beneficiaries, it must comply at a minimum, with its own internal procedures. (The court was referring to the BIAM.)

In the instant case, the Bureau by failing to comply with its own procedures transferred the Stewart Indian school to the State of Nevada and extinguished the right that the Council had as an otherwise eligible applicant under 25 U.S.C. § 443a and as a local government pursuant to 25 U.S.C. § 293a.

The third reason the Court should grant the petition is that the court of appeals has not decided an important question of Federal law, namely the applicability of 25 U.S.C. § 443a, and that question should be decided by this Court pursuant to Rule 17.1(c).

ARGUMENT

I. INTER-TRIBAL COUNCIL OF NEVADA, INC. HAS STANDING TO PETITION FOR FORFEITURE OF THE STEWART INDIAN SCHOOL LANDS BECAUSE IT AND ITS INDIVIDUAL MEMBER TRIBES ARE FORMER BENEFICIAL OWNERS UNDER 25 U.S.C. § 293a.

A. The Nevada Statute Authorizing the Acquisition of the Indian School Lands Implied a Trust for School Purposes.

Both the State of Nevada and the United States argue that there was no implied trust with respect to the Stewart Indian School lands. The 1887 act under which the lands in this case were acquired specifically provides that:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission **in trust for the benefit of such school**, and in case the United States will accept of the lands so purchased and make appropriation for the

> support of such school it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States... (Emphasis added) Act of 1887,p. 8.

This language clearly implies a trust for school purposes. A letter from William L. Benjamin to Senator Paul Laxalt dated February 14, 1981, explains how the lands in question were purchased under this act.

> According to a report on file in this office, the Commission first purchased 200 acres from S.C. Wright who was acting on behalf of the County of Ormsby, and a deed was executed on July 9, 1988, in favor of the United States. The land, however, was found to be unsuitable as a school site, and the deed was never accepted by the United States. In view of such finding, the Commission advertised an offer to purchase other lands and, as a result they acquired a total of approximately 223 acres from Mr. Carles F. Miller and Mr. Henry Ross on January 31, 1889.

> The deeds were accepted by the United States and are on record in Washington, D.C., and in the Bureau of Indian Affairs Southwest Title Plant in Albequerque, New Mexico.

Thus the lands were aquired by the School Commission and conveyed directly to the United States. It must be presumed that the Indian School Commission found, pursuant to § 8 of the 1887 Act, that the United States had agreed to accept these lands for Indian School purposes and therefore had them conveyed to the United States.

B. The Stewart Indian School Lands Are Indian Country and Therefore Are Held in Trust.

Both the United States and the State of Nevada argue that, since title was in the United States, this was not trust land. It is settled law that the United States' trust duty extends to Indian country and Indian country has been defined by the United States Supreme Court as including lands, the title to which is in the

United States. U.S. v. McGowan, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1937).

In McGowan the court determined that the Reno Indian Colony was Indian country when it said:

> The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1916 and 1926. The purpose of Congress in creating this colony was to provide lands for needy Indians scattered over the state of Nevada and to equip and supervise these Indians in establishing a permanent settlement. 302 U.S. at 537.

The court went on to state:

> In the case of United States v. Pelican, 232 U.S. 442, 58 L.Ed. 676, 679, 34 S.Ct. 396, this court said: "In the present case the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government.

> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the government. 302 U.S. 538-539.

In the present case the Stewart Indian School lands were validly set apart for the use of Indians. The lands were under the superintendence of the government. Therefore this area was Indian country, and it was under the supervision and guardianship of the United States.

The district court cited United States v. Myers, 206 Fed. 387 (8th Cir. 1913) in support of its decision that lands set apart for an Indian school are not Indian country. This case held that:

> It follows that this setting apart of a limited tract of the public domain for a school, which the government devotes mainly, or even entirely, to

> the training and education of Indian children, attending in their individual capacity, could not operate to convert that tract into Indian country as defined in the statue invoked by the plaintiff in error. Myers, supra, at 394

Myers is inapposite, because it was decided under the old definition of Indian country. The court held that Indian country was first defined in the Act of June 30, 1834, which stated that all of the United States west of the Mississippi, with some specification, was deemed to be Indian country. This definition was essentially re-enacted in the Act of August 18, 1856, which was passed as a supplement to the Act of 1834, and therefore, what was Indian country in Act of 1834 was Indian country within the meaning of § 2148. The court held that under the existing statute the school was not Indian country.

The definition of Indian country was

changed, however, in 1948 and codified in 18 U.S.C. § 1151 as follows:

> [T]he term "Indian country" as used in this chapter means
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights of way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguised, including rights of way running through the same. 18 U.S.C. § 1151.

In C.M.G. v. State, 594 P.2d 798 (Okla. 1979) the court held that lands set apart for the Indian School were Indian country, and distinguishing Myers stated:

> The State cites the 8th Circuit case of United States v. Myers,

> 206 F. 387 (8th Cir. 1913) for the proposition that Indian schools are not "Indian country." In that case, however, the school was located on land sold by the Kiowa, Comanche and Apache Tribes of Indians "for use of the common schools, (and) for the university, agricultural colleges, normal schools and public buildings of the territory and future state of Oklahoma;..." As the court pointed out, there was not a reservation for the benefit of Indians, but for the benefit of the territory and future state of Oklahoma... We need not determine whether Myers would be decided the same today as it was in 1913; it is sufficient to point out that the land in Myers, while it was used as an Indian school, had not been reserved for the use of Indians when it was acquired by the United States, as was the land in the instant case. Therefore, Myers does not stand for the proposition that Indian schools are not Indian country. C.M.G. v. State, supra at 801-802.

The court went on to state that in looking at the cases which have found that there is a dependent Indian community, and therefore "Indian country," Indian country need not inure to the

benefit of a single tribe or a named tribe, and that the title for the land need not remain with the Indians who are to benefit from its use.

In the instant case, as in C.M.G., the land in question was owned by the United States, was specifically reserved for use by Indians; and also as in C.M.G., all the students and most of the employees of the school were Indians and the students' tuitions and employees salaries were paid for by the Bureau of Indian Affairs. Therefore the land in question meets the definition of a dependent Indian community and is "Indian country." The land was validly set apart for the use of Indians under the superintendence of the Federal government. There cannot be any doubt that the State statutes and the Federal statutes establishing the Stewart Indian School, when construed together wih the definition of Indian country, create a dependent Indian

community entitled to the trust protection of th United States.

In United States v. Celestine, 215 U.S. at 290, 30 S.Ct. at 97, the Supreme Court states:

> [I]t is for Congress to determine when and how that relationship of [national] guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress...

More recently, the Supreme Court, in DeCoteau v. District County Court for Tenth Jud. Dist., 420 U.S. at 450, 95 S.Ct. at 1095, stated: "Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history."

If there is any doubt that this school land is Indian country, that doubt must be resolved in favor of the Indians. Legislation such as this which benefits Indians is to be construed,

where ambiguous, in their favor. Preston v. Heckler, 734 F.2d 1359, 1369 (9th Cir. 1984).

The Council had associational standing to represent its member tribes and the members of those tribes as former beneficiaries of the implied trust with respect to the Stewart Indian School land. Therefore, the Council had standing to bring an action for forfeiture under 25 U.S.C. § 293a.

II. THE COUNCIL HAS STANDING TO PURSUE THIS ACTION UNDER 28 U.S.C. § 1331, 1362 AND 25 U.S.C. § 443a.

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and § 1362, which provide for Federal question jurisdiction "wherein the manner in controversy arises under the Constitution, laws, or treaties of the United States." The Council submitted an

application requesting the transfer of the Stewart Indian school lands and buildings to it pursuant to 25 U.S.C. § 443a.

25 U.S.C. § 443a permits the Secretary of the Interior, at the request of any Indian group, to convey to that group title to any federally owned buildings, improvement or facilities that are situated on lands reserved for the administration of its affairs and that are no longer required by the Secretary for the administration of Indian affairs.

The court of appeals held that 25 U.S.C. § 443a was inapplicable because:

> We find no evidence to support the Council's assertion that the site was reserved for the administration of the affairs of its member tribes. Slip Opinion, p. 10953

The petitioner strongly disagrees. The record in this case is replete with references

to the fact that the Stewart Indian School Complex included the Western Nevada Agency of the Bureau of Indian Affairs which administers programs dealing with the Western Nevada tribes.

Robert Hunter, the Superintendent of the agency, was called to testify with respect to this issue. He was asked the following questions and gave the following answers during direct examination:

Mr. Sferrazza:

Q You were the Superintendent at the time of the transfer of the Stewart Indian School from the Federal government to the State of Nevada?

A Yes, I was.

Q At that time did you occupy one of the buildings at Stewart? Did your agency occupy one of the buildings?

A Our agency occupied building number 89. TR Vol.I, pp. 25-26.

Trial Exhibit 18 attachment number 3 and trial number 24 make it clear that the Western Nevada Agen the Bureau of Indian Affairs was located on the Stew

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Indian school campus. Attachment number 3 of Exh
a letter dated November 22, 1983, from Robert Hun
Superintendent of Western Nevada Agency, to Gover
Richard Bryan stating that:

> The Western Nevada Agency is located on the former Stewart Indian School campus, land that was deeded to the State of Nevada in November, 1982.

Exhibit 24 is a letter from the Superintendent to the Area Director in the Phoenix area office, stated January 5, 1983, and it states that:

> The situation here at Western Nevada Agency, with the transfer of the campus to the State of Nevada, has become critical.

A review of the Adaptive Use Plan, specifically pages 22 through 25, shows that there are many references to the fact that the Western Nevada Agency and the Indian Health Service were both located within the Stewart Indian School Complex.

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25 U.S.C. § 13 (commonly referred to as the Snyder Act) provides the enabling legislation for the funding of the Bureau of Indian Affairs. It provides that:

> The Bureau of Indian Affairs, under the Supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> ...For the employment of inspectors, supervisors, superintendents, ...And for general and incidental expenses in connection with the administration of Indian affairs... 25 U.S.C. § 13.

25 U.S.C. § 40 provides that "the limits of each superintendency, agency, and subagency shall be established by the Secretary of the Interior, either by tribes or geographical boundaries."

These statutues make it clear that the Secretary of Interior may establish an agency either by tribe or geographical boundaries. In this case the Western Nevada Agency is established by geographical boundaries, and it is charged under the Snyder Act with the administration of Indian affairs.

The Secretary of the Interior, by his conveyance of the Stewart Indian School lands to the State of Nevada, determined that the lands utilized by the Western Nevada Agency would no longer be required for the administration of Indian affairs.

The record supports the Council's contention that prior to the transfer the Stewart Indian complex had been reserved for the administration of the affairs of its member tribes, and that the Secretary then determined that the lands were no longer required for the administration

of Indian affairs. The Council represents all of the tribes whose affairs are administered by the Western Nevada Agency of the Bureau. It clearly had standing under 25 U.S.C. § 443a to object to the transfer to the State of Nevada of the lands utilized by the Bureau for the administration of tribal affairs.

III. THE INTER-TRIBAL COUNCIL OF NEVADA, INC. HAS STANDING UNDER THE ADMINISTRATIVE PROCEDURE ACT TO REQUEST REVIEW OF A VIOLATION OF THE BUREAU OF INDIAN AFFAIRS MANUAL (BIAM).

The BIAM is published and is used by the Bureau to administer all of its programs. The Supreme Court in Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, at 1074, 39 L.Ed.2d 270 (1974), recognized that:

> Before the BIA can extinguish the entitlement of these otherwise eligible

> beneficiaries, it must comply at a minimum, with its own internal procedures. (The court was referring to the BIAM.)

In the instant case, the Bureau by failing to comply with its own procedures transferred the Stewart Indian school lands to the State of Nevada and extinguished the right that the Council had as an otherwise eligible applicant under 25 U.S.C. § 443a.

The Bureau had a fiduciary obligation to fairly consider the Council's application under 25 U.S.C. Section 443a. In Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 at 713 (8th Cir. 1979), the court held:

> By holding that the Bureau failed to comply with its own procedures, we are not, as the government asserts, holding that the Oglala Sioux Tribe is entitled to a superintendent of its choice. We hold only that where the Bureau has

> established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Morton v. Ruiz, supra at 236, 94 S.Ct. at 1075, quoting Seminole Nation v. United States, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942).

The United States argued that even if the Council was correct in its assertion that the lands could be transferred to it, there was no showing that the lands would be transferred to it. The Council is not required as a matter of law to show that the lands would be transferred to it. It is sufficient to show that the Secretary could have transferred lands to it in order to have standing.

In Preston v. Heckler, 734 F.2d 1359, 1360 (9th Cir. 1984) the court held that:

> It follows that the real issue is whether Preston meets the standing requirements of the APA. In order to do so, she need not demonstrate that she would have been hired if the Secretary had complied with the law... We have previously held that, when challenged agency conduct allegedly renders a person unable to fairly compete for some benefit, that person has suffered a sufficient "injury in fact" and has standing under the APA. Preston, 734 F.2d at 1360.

In Navajo Tribe of Indians v. United States 364 F.2d 320, 324 (Ct.Cl. 1966) the court held:

> Of course, plaintiff cannot prove what would have happened if the Tribe had been consulted prior to the assignment, the plaintiff's inability is attributable to the failure of the defendant to keep the Tribe informed and therefore, the doubt should be resolved in favor of plaintiff. Cf. United States v. Shoshone Tribe, etc., 304 U.S. 111, 117, 58 S.Ct. 794, 82 L.Ed. 1213 (1938). Accordingly, we reject

> defendant's assertion that it is uncertain whether the government would have proceeded with the project if it had not obtained the assignment from Continental. We shall assume that, if Continental had given up the lease to the Navajo's, the Bureau of Mines would then have acquired the lessees's interest from the Tribe. Navajo, 364 F.2d at 324.

In the instant case petitioner cannot prove what would have happened if the Council's application had been considered by the Secretary, but the doubt should be resolved in favor of the petitioner and for purposes of this appeal, it should be presumed that the Council's request for transfer would have been granted.

The court of appeals held in the instant case that:

> "Because the Council has no rights protected by § 293a it has no standing to protest the Secretary's alleged failure to properly implement that statute. Slip Opinion, 10955.

It is petitioner's position that it had rights under § 293a as a former beneficial owne and as a competing local government, but even i this court upholds the court of appeals on this issue, the petitioner had a competing applicati under 25 U.S.C. § 443a. Clearly the Council wa injured in fact by the failure of the Bureau to compare these competing applications based on i own rules.

IV. THE STATE OF NEVADA HAS VIOLATED THE CONDITIONS OF TRANSFER.

There are two principle conditions of the transfer that have been violated by the State o Nevada. Condition number two provides:

> The State of Nevada shall make every reasonable effort to protect and preserve the property for public benefit. All work on the structure shall be done with materials and workmanship which is the same as those found in the structures originally built...

and condition number thirteen provides:

> The State of Nevada recognizes that the Stewart Indian School has been declared eligible for inclusion on the register of National Historic Places, and as such shall be maintained in accordance with the National Historic Preservation Act of 1966...

The United States and the State of Nevada make a great deal of a report by W.B. Consultants, Inc. that the buildings were not in good condition at the time that they were transferred.

At no time during the trial was any of this evidence presented. The Council did not have an opportunity to cross examine W.B. Consultants, Inc., and the only evidence in the record contradicts the conclusions of W.B. Consultants, Inc.

In its Memorandum Opinion of March 10, 1987, the district court held that:

> We find the testimony of the dramatic demise of the premises incredible. We have no doubt that conditions have not improved, but it is apparent that the complex as a whole was in a rather sorry condition in July, 1982.

The United States and the State of Nevada are the one responsible for the condition of the School. A statement that "we have no doubt that conditions have not improved..." is in fact a finding that the State of Nevada has not made "every reasonable effort to protect and preserve the property for public benefit."

The fact that the property was in a "sorry condition" in July, 1982, and it still was in a "sorry condition" on March 4, 1987, five years later, means that the State of Nevada has not made "every reasonable effort to protect and preserve."

The district court went on to hold:

> We do not applaud the State of Nevada for any diligence in its maintenance of the complex. Nevertheless we cannot say that the State violated these conditions.

If the State did not show any diligence in its maintenance of the complex, then it di not "make every reasonable effort to protect and preserve the property for public benefit."

The district court also stated:

> The second condition requires reasonable efforts to protect and preserve. The Plaintiff would understandably prefer best efforts, but the court is unwilling to rewrite the deed.

The condition is not "reasonable efforts;" the condition is "every reasonable effort."

The State did not even have a maintenance plan for the Stewart Indian School complex as required by the National Historic PReservation

Act and by condition number 13, which provides that the School "shall be maintained in accordance with National Historic Preservation Act of 1966."

The Council provided in Exhibit "19A" a Preservation Maintenance Program prepared by Ke Seavey with respect to the Stewart Indian Schoo Kent Seavey testified the this Program was base on the Secretary of the Interior's Standards fo Rehabilitation and the State of Nevada law.

The State of Nevada did not have a preservation maintenance program prior to acquisition and did not implement one after acquisition.

The district court criticized the testimon of Perial Ellis and Kent Seavey as being biased but Perial Ellis was in fact a Bureau of Indian Affairs employee. If his testimony was biased, then it was because the Secretary of the Interi

was not fulfilling its trust responsibilities.

The most damning testimony, however, was that from the State's own witness, Terry Sullivan. Mr. Sullivan testified that the State tried with limited funds to make do as best it could. This is not "every reasonable effort."

The federal government's determination to transfer the School site to the State of Nevada was based in large part upon the State's financial ability to immediately assume control of the property and on the promise of future funding from the legislative branch of the State of Nevada. The Deputy Assistant Secretary of Indian Affairs stated:

> It is to be noted that all of the statements pertaining to the use of the property, in aggregate, formed a substantive base upon which our decision to transfer the property was made. It appeared to us that there was a clear intent

> on the part of the Executive Branch of the State of Nevada to fully utilize the Stewart property for public purposes within the meaning of 25 U.S.C. § 293a. Moreover, it was apparent that the Executive Branch of the State of Nevada had the financial ability to immediately assume control of the property and to gain future funding from the Legislative Branch of the State of Nevada.

In fact, at the time of trial in this action, the State of Nevada was still trying to get federal funding to maintain and rehabilitate the Stewart Indian School.

In 1985, the State leased part of the Stewart facility to the Federal Emergency Management Agency (FEMA) for future use as a training site. Thereafter, FEMA experienced budgetary problems and was unable to immediately use the facility; the State agreed to waive for two years (until September, 1988) the lease requirement that FEMA maintain the facility.

Negotiations were also under way in December, 1986, to lease some buildings to the U. S. Geological Survey.

The State did not have the money to maintain and rehabilitate the Stewart Indian School facility and in fact has had to get the federal government to assume this responsibility. This is in direct contravention of the stated purpose of closing the Stewart Indian School, which was to save the federal government money.

If there is any doubt that the State of Nevada is not using "every reasonable effort" to maintain these buildings, a review of the letter from Terry Sullivan, Director of the Department of General Services for the State of Nevada, to Bill Bible, Director of the Budget for the State of Nevada should resolve it. In his letter, Mr. Sullivan states in conclusion:

> I urge that we do the absolute minimum of structural repairs to meed code and that all remodeling, such as painting and partitions be done with contract employees supervising prison labor. (Emphasis added)

This is not "every reasonable effort." It is not the type of quality labor that is recommeded by the guides for rehabilitation to do this type of sensitive work and it is certainly not the commitment of resources of the State of Nevada that was indicated in their application.

CONCLUSION

A review of the facts in this case shows a totally arbitrary and capricious decision by the Bureau. Not only has the Bureau breached its trust responsibility by totally ignoring the Council's application under 25 U.S.C. § 443a, it has acted in total disregard of Congress which closed Stewart Indian school in order to save the

tax payers money. The Bureau gave away Stewart Indian school in total violation of its own rules as established in the BIAM and failed to ensure that the State of Nevada lived up to the conditions of the transfer of the Stewart Indian school complex.

For the reasons stated above the court of appeals decision sould be reversed, the transfer of the Stewart Indian school lands should be forfeited and title should be restored to the Federal government. The Federal government should then fairly evaluate the competing applications of the Indian tribes and the State of Nevada and make a determination based on the facts as to who is best prepared to protect and preserve this national historic monument. It would be a travesty to the Indian people of this nation if the State of Nevada were able to continue on its present course of conduct and

allow Stewart Indian school to deteriorate any further.

Respectfully submitted.

Peter J. Sferrazza, Esq.

March 17, 1989

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTER-TRIBAL COUNCIL OF NEVADA, INC.,

Plaintiff-Appellant,

v.

DONALD HODEL, individually and as Secretary of the Interior of the United States of America, and the STATE OF NEVADA,

Defendants-Appellees.

No. 87-1908

D.C. No. CV-R-82-208-BRT

OPINION

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

Argued and Submitted
June 16, 1988—San Francisco, California

Filed September 8, 1988

Before: Ruggero J. Aldisert*, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Aldisert

*Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY

Indians/Constitutional Law/Real Property

The court affirmed a judgment and held that an Indian tribe did not have standing to demand forfeiture of an Indian school complex nor did Nevada violate the conditions of a quitclaim deed.

With county funds, a site for the Stewart Indian School was purchased and deeded directly to the U.S. The funds paid were reimbursed by the Indian Appropriation Act. Eventually, Congress closed the School. Then Deputy Assistant Secretary for Indian Affairs, Roy Sampsel, indicated that as between Nevada and the Nevada Indian Tribes, the School property would be awarded to the applicant who submitted the best adaptive use plan. The School was then granted historic status upon nomination by Nevada. The Council then submitted an application for the site that included an adaptive use plan. The Council was notified that the Department of the Interior did not have the legislative authority to permit the transfer requested. The BIA had only limited authority to transfer the property to a state or local government pursuant to 25 U.S.C. § 293(a). Nevada then filed its application for transfer under section 293(a). The U.S. conveyed the School to Nevada on several conditions. Defendants received summary judgment. The court held that the Council lacked standing under section 293(a) because it was not a former beneficial owner of the property, and that, even if the plaintiff had standing, Nevada had reasonably complied with the terms and conditions of the quitclaim deed.

[1] The Supreme Court has articulated three prudential considerations. The final consideration is central to this case: The plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. [2] The Council lacks standing under

section 293(a) because it has not proved that it is the former beneficial owner of the School site. [3] The difficulty with the Council's argument arises from their initial conclusion that the land was conveyed in trust for the benefit of the tribes it represents. [4] The Nevada statute explicitly described the limitation of any trust: "for the benefit of such school." Nevada Indians' children represented a small percentage of the school's population. Nevada Indians could not be considered the sole beneficiaries of any trust established for the benefit of the school. [5] Moreover, the land was conveyed to the federal government in fee simple. [6] The record does not support the Council's contention that the School complex was reserved for the administration of the affairs of its member tribes. Therefore, the Council did not have standing under section 443(a) to protest the transfer of the land to Nevada. [7] Finally, the Council has failed to satisfy the statutory requirements for standing under the APA.

COUNSEL

Peter J. Sferrazza, Reno, Nevada, for the plaintiff-appellant.

Myles E. Flint, William A. Maddox, Shirley Smith, United States Attorney's Office, Reno, Nevada; Dirk D. Snel, Kathleen P. Dewey, Department of Justice, Washington, D.C., for the defendant-appellee Secretary of the Interior.

Brian McKay, Brian Chally, Nevada, Attorney General's Office, Carson City, Nevada, for the defendant-appellee State of Nevada.

OPINION

ALDISERT, Circuit Judge:

This appeal requires us first to decide if the Inter-Tribal Council of Nevada, Inc. ("the Council"), a non-profit corpo

ration composed of twenty-five Nevada Indian tribes, has standing to demand forfeiture of an Indian school complex that was conveyed by the federal government to the State of Nevada by quitclaim deed. Should we decide that the Council has standing, we must determine whether Nevada has violated the terms of the quitclaim deed, and whether the Secretary of the Interior was required to follow the guidelines for an application for transfer of the property set forth in the Bureau of Indian Affairs (BIA) Manual.

The district court held that the Council lacked standing, and that even if the substantive issues were to be reached, the Council would not be entitled to relief. The Council has appealed.

The district court had jurisdiction under 28 U.S.C. § 1361 (mandamus, a claim not pursued in this appeal), 28 U.S.C. § 1362, 28 U.S.C. § 1331, and 25 U.S.C. § 293(a). In pretrial proceedings, the court dismissed all counts of the complaint except the count demanding forfeiture of the deed under 25 U.S.C. § 293(a). In its March 10, 1987, opinion, the district court ruled solely on the Council's claim for forfeiture. Because the district court's judgment disposed of all claims, we have jurisdiction under 28 U.S.C. § 1291. The Council timely filed its notice of appeal under Rule 4(a)(1), F.R. App. P.

Whether the Council had standing to bring this action is a question of law reviewed *de novo*. *Fernandez v. Brock*, 540 F.2d 622, 626 (9th Cir. 1988). The district court's determination that Nevada did not violate the terms of the quitclaim deed involves findings of fact, reviewable under the clearly erroneous standard Rule 52(a), F.R. Civ. P.; *Seattle-First Nat'l Bank v. Bluewater Partnership*, 772 F.2d 565, 568 (9th Cir. 1985).

I.

Many aspects of the factual background of this dispute are not as clear as we would like them to be. But that is not the

fault of the litigants. The question presented in this case stems from events that took place in 1887, only 38 years after the first settlement in Nevada at Mormon Station, now Genoa. Official record keeping was not as precise in that era as it is in the modern computer age. Nevertheless, we can distill the following facts from the record.

In 1887, the Nevada state legislature authorized Ormsby County to issue $10,000 in bonds for the purpose of establishing an Indian school to train and educate Indian children. 1887 Nev. Stat. ch. XII. The statute created an Indian School Commission, and authorized it to spend the bond proceeds on land and improvements for the use of the school. The statute also provided that if the federal government would agree to establish a school, the land purchased with the bond proceeds would be conveyed to the United States for that purpose.

The Commission first purchased a 200-acre site from S.C. Wright. A deed for the land was executed on July 9, 1888, in favor of the United States. The United States, however, found the land to be unsuitable as a school site and never accepted the deed. The Commission then advertised for a site and, as a result, received offers of several parcels. Special Indian Agent Henry S. Welton recommended to the Secretary of the Interior that the federal government accept the purchase of a 223-acre tract, valued at $6,375, and belonging to two parties, Ross and Miller. Plaintiff's Ex. F (History of acquisition of Stewart Indian School lands. Original on file with BIA in Washington, D.C.). The site was purchased with county funds and deeded directly to the United States. The legal effect of that transaction constitutes the crux of the controversy before us. In the Indian Appropriations Act of 1888, 25 Stat. 217, 236, Congress appropriated $25,000 for the establishment of the school, which was subsequently named the Stewart Indian School. The funds paid for the site ($6,375) were reimbursed to Ormsby County by the Indian Appropriation Act of June 7, 1897, 30 Stat. 87; Plaintiff's Ex.

O (13 Report of the Department of Interior), 55th Cong. 2d Sess. 425 (1897).

In 1980, Congress closed the Stewart Indian School. Congress had decided to cut off funding for the school after determining that it was unsafe and too expensive to repair. Act of Dec. 12, 1980, Pub. L. No. 96-514, 894 Stat. 2957, 2968. *See* Memorandum Opinion of the District Court at 9-11 (quoting H. Rep. No. 1147, 96th Cong., 2d Sess., 41-42 (1980)). The House Report accompanying passage of the bill stated that adequate space existed in other schools to accommodate the children attending Stewart Indian School. At that time, only 27 students of the approximately 400 who were attending the school were Nevada residents; the majority of the students were from Arizona and California. According to the Council, a meeting was then held in September of 1981 among representatives of the Nevada Indian Tribes, the Nevada congressional delegation, and then Deputy Assistant Secretary for Indian Affairs, Roy Sampsel, at which time Mr. Sampsel indicated that as between the State of Nevada and the Nevada Indian Tribes, the Stewart Indian School property would be awarded to the applicant who submitted the best adaptive use plan. Third amended complaint at 5, ¶ 14.

In 1982, the school was granted historic status under the National Historic Preservation Act, 16 U.S.C. § 470, upon nomination by the State of Nevada. On May 4, 1982, the Council submitted an application for the site to the Secretary of the Interior on behalf of all the Nevada Indian tribes. The application included an adaptive use plan prepared by Kent Seavey, an authority on historic buildings and their preservation and maintenance. No affirmative action was taken on the Council's application. Instead, the Council received a letter from the Department of the Interior, asserting that the department did not have the necessary legislative authority to permit the transfer requested. The letter stated that the BIA had only the limited authority to transfer the property to a

state or local government pursuant to 25 U.S.C. § 293(a). Plaintiff's Ex. R.

On April 22, 1982, Nevada filed its application for transfer under section 293(a), which provides:

> The Secretary of the Interior, or his authorized representative, is authorized to convey to State or local governmental agencies or to local school authorities all the right, title, and interest of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: *Provided*, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: *Provided further*, . . . If the grantee of such land fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner, if an individual Indian or an Indian tribe, may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed.

The BIA Manual prescribes conditions and procedures to be complied with in order to effect a conveyance of federal Indian school properties under section 293(a). The Manual requires "a complete statement as to the program of utilization, including salvage or conversion plans, a justification for the need for all of the acreage in any land requested and for the need for specific buildings and other improvements." 43 BIA Manual Supp. 2, § 11.18A(3)(f). The Manual also provides that "the consent of the beneficial owner shall be obtained before there is a conveyance of title to land held by

the United States in trust for an individual Indian or Indian Tribe." *Id.* § 11.18B.

The Council and several individual Nevada Indian tribes represent that they opposed the transfer of the Stewart School property to Nevada, contending that Nevada had not submitted an adaptive use plan for the property in accordance with the Secretary's request and the requirements of the National Historic Preservation Act. Nevada's application for the site stated that the property would be used for public purposes, but that "with the innumerable unanswered questions on the site [conditions], it is unreasonable for the Federal government to expect Nevada to give the precise use at this point in time." Application for Stewart Indian School Property by the State of Nevada at 2.

In July of 1982, the United States conveyed the Stewart School complex to the State of Nevada. The conveyance contained several conditions. Among these was a provision that "[t]he State of Nevada shall make every reasonable effort to protect and preserve the property for the public benefit," and several conditions assuring that no alterations or rehabilitation would be performed without the approval of the Nevada State Historic Preservation Officer and the Bureau of Indian Affairs. Quitclaim Deed at 6. Nevada also agreed to maintain the property in accordance with the National Historic Preservation Act. *Id.* at 10. The Stewart School site is presently being used for various public purposes including, among others, use by a community college, several community service groups, and the Nevada Department of Prisons. The site also houses the Stewart Indian Museum.

The record does not show what constituted final agency action by the Department of Interior, or the date thereof authorizing the conveyance to Nevada. The record also does not indicate the manner of the precise objection to the conveyance by the Council as implied in its argument before us; nor does the record indicate if and how the Council lodged an

administrative appeal in the Department of Interior after learning that Nevada's application had been accepted.

II.

On June 10, 1982, the Council filed a complaint seeking to enjoin the proposed conveyance of the Stewart School property to Nevada, alleging that the land was held by the United States in trust for Nevada's Indians and that the Secretary had failed to obtain consent to the transfer from the "beneficial owner" as required by 25 U.S.C. § 293(a). The complaint further alleged that Nevada's application for transfer failed to comply with the requirements of the BIA Manual sections dealing with such transfers, and that the Secretary's approval violated both the Administrative Procedure Act (APA), 5 U.S.C. §§ 500-706, and section 106 of the National Historic Preservation Act. The district court denied the injunction on July 22, 1982, and thereafter the property was deeded to Nevada. The Council then amended its complaint, asserting an additional cause of action under the forfeiture provision of section 293(a), alleging that Nevada had failed to comply with the terms and conditions of the quitclaim deed and requesting that the deed be cancelled and title forfeited to the United States. In pre-trial proceedings, the district court dismissed all of the Council's claims except for the forfeiture action. *See Inter-Tribal Council of Nevada v. Watt*, 592 F. Supp. 1297 (D. Nev. 1984). The court concluded that the Council's other allegations stated "a case in the nature of an action to quiet title to void a conveyance for fatal irregularities in its implementation." *Id.* at 1298. The court held that sovereign immunity barred such an action as against both the State of Nevada and the United States. *Id.*

The district court held a bench trial on December 9 and 10, 1986, and on March 10, 1987, the court entered judgment for the defendants holding that the Council lacked standing to maintain an action under section 293(a) because it was not a former beneficial owner of the property, and that, even if the

plaintiff had standing, Nevada had reasonably complied with the terms and conditions of the quitclaim deed.

The question of standing under section 293(a) is squarely implicated in this case. There is also a tangential question of standing under 25 U.S.C. § 443(a) to which appellant makes reference in its brief: "Plaintiff submits that it is an Indian group within the meaning of 25 U.S.C. Section 443(a) and that even if it is not, it clearly represents tribes that would be eligible for the transfer of the Stewart Indian School complex. As a competing applicant for the transfer of the Stewart Indian School complex, the Inter-Tribal Council of Nevada, Inc. has standing to bring the instant action." Br. for appellant at 29-30. Although an examination of the various complaints filed by the Council does not reveal that it ever asserted a cause of action under section 443(a), we will nevertheless discuss this possibility because the record indicates that the Council relied upon the section in its opposition to the federal defendants' motion to dismiss. C.R. 43.

III.

The rules of standing in a federal court reflect both the Article III case-or-controversy requirement under the Constitution and what the Supreme Court calls prudential considerations that define or limit the role of the courts. Standing is a threshold determination of the propriety of judicial intervention. We will take our directions from the teachings of the Supreme Court, which have been summarized in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975).

A.

In the constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between it and the defendant within the meaning of Article III. As an aspect of justiciability, the standing

question asks whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant the plaintiff's invocation of federal court jurisdiction and justify exercise of the courts' remedial powers on behalf of the plaintiff. *Warth*, 422 U.S. at 498 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). A federal court's jurisdiction, therefore, can be invoked only when the plaintiff has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973); *see also Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151-54 (1970).

For the purpose of our analysis, we will assume that the Council meets the Article III constitutional standing requirements. But this only begins our inquiry. The source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Article III's minimum requirements, serve to limit the role of the courts in resolving public disputes. *Warth*, 422 U.S. at 500. Essentially, the standing question in such cases is whether the statutory or constitutional provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. *Id.*

[1] The Supreme Court has articulated three prudential considerations. First, the plaintiff generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. Next, a federal court will not adjudicate abstract questions of wide public significance that amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches. Finally, the plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Valley Forge*, 454 U.S. at 474-75. The final consideration is central to our decision in this case. We shall examine the Council's right to standing under the statutory provisions of

25 U.S.C. § 293(a), 25 U.S.C. § 443(a), and the APA, 5 U.S.C. §§ 500-706.

B.

[2] For the plaintiff to prevail on the question of standing to seek a forfeiture under 25 U.S.C. § 293(a), it must prove that it is the former beneficial owner of the Stewart School site. We have concluded, as did the district court, that the Council lacks standing because it has not proved that it is the former beneficial owner of the property.

The Council's best case scenario is drawn primarily, if not exclusively, from section 8 of the 1887 Nevada statute, which provides:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission *in trust for the benefit of such school*, and in case the United States will accept of the lands so purchased and make appropriations for the support of such school, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

1887 Nev. Stat. ch. XII (emphasis added).

This provision forms the major premise of the Council's first syllogism. From this premise, the Council argues that it represents the majority, if not the entirety, of the Indian population of Nevada for whose benefit the school was established. From these two premises, the Council draws the conclusion that the land was conveyed in trust for the benefit of its member tribes, as contemplated in the 1887 Nevada statute.

The conclusion of this first syllogism then becomes a building block for the Council's second syllogism, which is based on 25 U.S.C. § 293(a). The major premise here is that the Secretary of the Interior may not convey the property without the consent of the "former beneficial owner." The minor premise is that, as concluded above, the Council (in its representative capacity) is the former beneficial owner of the land. Therefore, the Council concludes, the Secretary may not convey the property without its consent.

[3] The difficulty with the prosyllogism based on the 1887 Nevada statute, and the resulting episyllogism based on section 293(a), is the Council's initial conclusion that the land was conveyed in trust for the benefit of the tribes it represents. The appellees argue that the tracts in question were never conveyed to the Indian School Commission in trust for anyone. Rather, the tracts were conveyed directly to the federal government by the private owners in fee simple. Moreover, appellees assert, the Nevada statute's language does not support the suggestion that a trust was to be implied if the land was conveyed directly to the United States, instead of to the Commission. Furthermore, appellees contend, even if a trust had been implied, the Nevada statute did not contemplate a trust for the benefit of the Council, or a particular Nevada tribe, or the Nevada Indian population in general.

[4] The Nevada statute explicitly described the limitation of any trust: "for the benefit of such school." It is not without significance that when Congress decided to close the Stewart Indian School, only 27 students enrolled in the school came from Nevada. The remainder of the 400-student population came from other states, the majority from Arizona and California. This raises the question of whether Nevada Indians, whose children represented 6.75% of the school's population, could properly be considered the sole beneficiaries of any trust established for the benefit of the school. We think not.

[5] A key premise of the Council's argument anchored in the Nevada statute, therefore, has no support in the statute

itself. The land was not conveyed to the Indian School Commission in trust for anyone; it was conveyed to the federal government in fee simple. The only trust that was expressed or implied was (a) if the conveyance was to the Commission and (b) "for the benefit of such school," and not to any Indian tribe, band, or group. Accordingly, because the premise has no basis, the argument is not sound and its conclusion is flawed. This flawed conclusion may not then serve as the minor premise in the Council's critical contention that it is the former beneficial owner as contemplated by section 293(a).

We are aware that statutes benefiting Native Americans should be construed liberally in their favor. *Tyonek Native Corp. v. Secretary of the Interior*, 836 F.2d 1237, 1239 (9th Cir. 1988). "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 149 (1984). Yet a rule of statutory construction may not be used to alter history. We are not faced here with a doubtful expression.

We, therefore, conclude that the Council lacks standing under this statute. The Council's complaint does not fall within the zone of interests protected or regulated by section 293(a).

IV.

We turn now to the Council's secondary argument, that it possesses standing under 25 U.S.C. § 443(a), which states:

> The Secretary of the Interior at the request of any Indian tribe, band, or group is authorized to convey to such Indian tribe, band, or group, by such means as he may deem appropriate, title to any federally owned buildings, improvements, or facilities (in-

> cluding any personal property used i. connection with such buildings, improvements, or facilities) that are situated on lands of such tribe, band, or group or on lands reserved for the administration of its affairs, and that are no longer required by the Secretary for the administration of Indian affairs.

[6] The Stewart School site was never set aside by treaty or statute as Indian land. The Council contends that the Stewart Indian School complex was reserved for the administration of the affairs of its member tribes. The record does not support this contention. The site was purchased for use as a school. The school served students from all over the western United States, primarily Arizona and California. We find no evidence to support the Council's assertion that the site was reserved for the administration of the affairs of its member tribes. Because the land in question is not within the purview of section 443(a), the Council had no statutory rights under this section. Therefore, the Council did not have standing under section 443(a) to protest the transfer of the land to the state of Nevada.

V.

Finally, the Council asserts that, in approving Nevada's application for transfer, the Secretary failed to comply with the provisions of the BIA Manual in violation of the APA, 5 U.S.C. §§ 500-706. It bears emphasis that this argument is based on the contention that the transfer to Nevada under 25 U.S.C. § 293(a) was tainted. The Manual sections cited by the Council in its complaint as the guidelines to which the Secretary failed to adhere, 43 BIA Manual Supp. 2, §§ 11.18 A, B, implement section 293(a). Although the Council relied somewhat on section 443(a) to challenge the failure of the Secretary to convey the site to the Council or its member tribes, it has not directly argued that its complaint also serves as a petition for review of the final agency action denying its request.

In contrast, the Secretary relies on section 701(a) of the APA, which states that the Act's judicial review provisions apply "except to the extent that . . . statutes preclude judicial review." The Secretary argues that 25 U.S.C. § 293(a) precludes review because it limits the right to challenge transfers to former beneficial owners. The Supreme Court has told us that "Congress will be presumed to have intended judicial review of agency action to be available unless there is 'persuasive reason' to believe otherwise." *United States v. Fausto*, 108 U.S. 668, 675 (1988).

[7] We need not decide whether section 293(a) precludes judicial review in this case. Nor need we decide whether there is persuasive reason to believe Congress did not intend judicial review to be available. Instead we determine that the Council has failed to satisfy the statutory requirements for standing under the APA. The standing requirement for challenging the conduct of a federal agency under the APA is set forth in 5 U.S.C. § 702. *See Preston v. Heckler*, 734 F.2d 1359, 1364 (9th Cir. 1984). Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

In *Data Processing*, 397 U.S. at 152-53, the Court held that, in order to meet the standing requirement of section 702, "the interest sought to be protected by the complainant [must] arguably [be] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Subsequently, the Court said that the holding in *Data Processing* includes a requirement that "the plaintiff had been injured in fact by the action he sought to have reviewed." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976); *see also Sierra Club v. Morton*, 405 U.S. 727, 732-33 (1972); *Fair v. E.P.A.*, 795 F.2d 851, 854 (9th Cir. 1986).

As we have shown above, the interest sought to be protected by the Council is not within the zone of interests protected by the statutes in question. 25 U.S.C. § 293(a) and 25 U.S.C. § 443(a). The BIA Manual sections allegedly violated by the Secretary implement § 293(a). Because the Council has no rights protected by § 293(a), it has no standing to protest the Secretary's alleged failure to properly implement that statute.[1]

VI.

Because of the view we take, we need not reach the merits of the case that were addressed by the district court. For the foregoing reasons, the judgment of the district court dismissing the complaint for lack of standing will be affirmed.

AFFIRMED.

[1]Neither the complaint nor the briefs represent that the Council made any attempt to have the Secretary of the Interior review the decision or procedures of the BIA. The record does not disclose the nature of the official action approving Nevada's application for transfer of the school site, the level at which the decision was made, or whether an administrative appeal was lodged. Nor does it suggest that no procedure for administrative review was available. Even if the Council had surmounted the standing barrier, which it has not, there is a question whether it would still be barred from judicial relief for failure to exhaust administrative remedies.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTER-TRIBAL COUNCIL OF NEVADA, INC.,

Plaintiff-Appellant,

vs.

DONALD HODEL, individually and as Secretary of the Interior of the United States, and the STATE OF NEVADA,

Defendants-Appellees.

C.A. No. 87-1908

D.C.No.CV-R-82-208

ORDER

Filed: Dec. 21, 1988

Before: ALDISERT*, BEEZER and O'SCANNLAIN, Circuit Judges

Appellant's petition for rehearing is denied.

*Ruggerro J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

INTER-TRIBAL COUNCIL OF NEVADA, INC.

Plaintiff,

vs.

JAMES WATT, individually and as Secretary of Interior of the United States of America, et al.

Defendants.

_____/

Civil R-82-208-BRT

Entered:
Sept. 26, 1984

MEMORANDUM OPINION AND ORDER

This case is before the Court for a ruling on defendants' motions to dismiss the Second Amended Complaint.

The objective of the action is to establish the invalidity of the procedures which led to the conveyance by the United States of America to the State of Nevada of

some 50 acres of land formerly a part of the Stewart Indian School property near Carson City, Nevada, and to restore the title to said property to the United States.

The plaintiff, Inter-Tribal Council of Nevada, Inc., is an association of 23 Indian tribes with governing bodies recognized by the Secretary of Interior. At the hearing on the motion for preliminary injunction the court concluded that the plaintiff was not the "beneficial owner" and was not an "Indian tribe" within the meaning of 25 U.S.C. § 293a. After further reflection the court believes that this conclusion was probably erroneous and that the plaintiff, Inter-Tribal Council, should be considered to be the appropriate representative of the Indian

tribes, if any, deemed to be the beneficial owners of the Stewart Indian School property. Therefore, the plaintiff has standing to represent the rights of the Indians or Indian tribes in any litigation within the jurisdiction of this Court. Great Lakes Inter-Tribal Council, Inc. v. Voight, 309 F.Supp. 60 (W.D.Wis. 1970).

The state defendants Robert List and Richard Bryan, as the former and the present Governor of the State of Nevada, move to dismiss because the State of Nevada has title to the property and is an indispensible party. There seems to be no sound answer to this argument and none has been made. Putting aside, for the moment, the provisions of 25 U.S.C. § 293a, the allegations of the Second Amended Complaint state a case in the nature of an action to

quiet title to void a conveyance for fatal irregularities in its implementation. Neither the State of Nevada nor the United States may be sued in this Court in such an action. The State of Nevada has not waived its Eleventh Amendment sovereign immunity. The bar of sovereign immunity cannot be avoided by naming state officials, rather than the state itself as defendants in a so-called "officers suit." Such an action is in reality one against the state. Block v. North Dakota ex rel. Board of University and School Lands, ___U.S.___, 103 S.Ct. 1811 (1983); Pennhurst State School & Hospital v. Halderman, ___U.S.___, 104 S.Ct. 900 (1984). With respect to the United States, the waiver of immunity contained in the Quiet Title Act (28 U.S.C. § 2409a) does not apply to trust or

restricted Indian lands.

If plaintiff can state a claim for relief within the jurisdiction of this Court, it must rely solely upon the enabling provisions of 25 U.S.C. § 293a:

> Conveyance of school properties to local school districts or public agencies
>
> The Secretary of the Interior, or his authorized representative, is authorized to convey to State or Local governmental agencies or to local school authorities all the right, title, and interest of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: Provided, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: Provided further, That no more than fifty acres of land shall be transferred under the terms of this section in connection with any single school property conveyed to State or local governmental agencies or to

> local school authorities. Any conveyance under this section shall reserve all mineral deposits in the land and the right to prospect for and remove such deposits under rules and regulations prescribed by the Secretary of the Interior. If at any time the Secretary of the Interior determines that the grantee of any such lands, improvements, and personal property has failed to observe the provisions of the transfer agreement and that the failure has continued for at least one year, he may declare a forfeiture of the conveyance and the title conveyed shall thereupon revert to the United States. Such determination by the Secretary of the Interior shall be final. If the grantee of such land fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner, if an individual Indian or an Indian tribe, may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed.

This action may fall within the last sentence of this statute and plaintiff has

attempted to state such a claim for relief in that portion of its Second Amended Complaint designated as the Sixth Cause of Action. In such an action, the State of Nevada and the Secretary of the Interior are indispensible parties defendant.

The State of Nevada has waived its sovereign immunity with respect to an action under § 293a. Here the State made its application pursuant to the authorization of § 293a and accepted a conveyance of the property pursuant to that section. It thereby rendered itself subject to the forfeiture provisions of the statute and waived its sovereign immunity. When Congress has authorized suit against a class of defendants and the state participates in the activity regulated by federal law, Eleventh Amendment immunity is

inapplicable. It is waived. Parden v. Terminal Railway of Alabama, 377 U.S. 184; Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Circuit 1979); Department of Education State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983).

In consideration of the premises,

IT IS HEREBY ORDERED:

1. The motions to dismiss the Second Amended Complaint are hereby granted.

2. Plaintiff, if so advised, may within twenty (20) days file an amended and supplemental complaint naming the Secretary of Interior and the State of Nevada as the sole parties defendant and stating a claim for relief under 25 U.S.C. § 293a. Leave to add the State of Nevada and serve it with process as a party

defendant is granted. If plaintiff elects not to file such an amended and supplemental complaint this action will be dismissed.

DATED September 20, 1984.

Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

APENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

INTER-TRIBAL COUNCIL
OF NEVADA, INC.,

Plaintiff, Civil R-82-208-BRT

vs.

DONALD HODEL, individually, and as Secretary of the Interior of the United States of America, and the STATE OF NEVADA,

Entered:
Mar. 10, 1987

Defendants.
_____/

MEMORANDUM
OPINION

The parties tried this action to the court on December 9 and 10, 1986. The trial was limited by prior order to a petition for declaration of forfeiture (sixth cause of action) pursuant to 25 U.S.C. § 293a. Plaintiff's statements in the pretrial order to the effect that the first cause of action (transfer without consent) remained viable after the court's

earlier order (see 592 F.Supp. 1297, 1299) were erroneous. The court granted leave after dismissal to file a third amended complaint "stating a claim for relief under 25 U.S.C. § 293a." Id. The court had stated earlier that "This action may fall within the last sentence of this statute and plaintiff has attempted to state such a claim for relief in that portion of its Second Amended Complaint designated as the Sixth Cause of Action." Id. Therefore, the third amended complaint is superfluous insofar as it states causes of action first through fifth.

Had the first cause of action survived the prior order of dismissal, it would fail here in any event. As will be discussed, no express trust ever existed and any

implied trust terminated in 1980 when Congress decided to close the school. Therefore, there were no beneficial owners at the time of transfer from whom consent could be obtained.

The Act of June 4, 1953, as amended, 25 U.S.C. § 293a provides:

> The Secretary of the Interior, or his authorized representative, is authorized to convey to State or Local governmental agencies or to local school authorities all the right, title, and interest of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: Provided, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: Provided further, That no more than fifty acres of land shall be transferred under the terms of this section in connection with any single school property conveyed to State or local governmental

agencies or to local school authorities. Any conveyance under this section shall reserve all mineral deposits in the land and the right to prospect for an remove such deposits under rules and regulations prescribed by the Secretary of the Interior. If at any time the Secretary of the Interior determines that the grantee of any such lands, improvements, and personal property has failed to observe the provisions of the transfer agreement and that the failure has continued for at least one year, he may declare a forfeiture of the conveyance and the title conveyed shall thereupon revert to the United States. Such determination by the Secretary of the Interior shall be final. If the grantee of such land fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner, if an individual Indian or an Indian tribe, may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed.

The instant case is based on the last

sentence of § 293a, added to the statute by a 1957 amendment. 85 Cong., 1st Sess., 71 Stat. 29. The reason for the 1957 amendment is explained in Senate Report No. 207 to S. 998 at 1-2: "Some Indian tribes do not wish to rely solely on the Secretary of the Interior to protect their interests; therefore they have requested the introduction of legislation that would provide an additional method for enforcing the forfeiture."

Plaintiff lacks associational standing to petition for forfeiture because its members would not have standing to sue in their own right. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342 (1977). The earlier order simply indicated that standing was plead adequately. Plaintiff failed to prove

standing at trial. Congress expressly limited the jurisdiction of the district court in granting "the former beneficial owner, if an Indian or an Indian tribe" standing to petition the district court. "As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." Cheng Fan Kwok v. INS., 392 U.S. 206, 212 (1967) citing Utah Junk Co. v. Porter, 328 U. S. 39, 44 (1945). The plain language of the statute controls absent a clearly expressed legislative intention to the contrary. Bread Political Action Committee v. FEC, 455 U.S. 577, 580-81 (1982). No Indian or tribe held equitable title to the land at issue.

The term "former beneficial owner" is

nowhere separately defined, in the Act or in its legislative history. Its meaning is clear, however, by internal reference to the "former" beneficial owner. "Former" pertains to the 1953 language of the first proviso of § 293a: "Provided, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an Indian or Indian tribe ... (emphasis added)." Consistent language in the House Report explaining this language confirms that the status of "beneficial owner" is tied not to any trust relationship between the parties, but rather to the quality of title to the real property. "If the land is held in trust for an Indian or tribe, consent of the beneficiary must be obtained." House Report No. 226 to H.E.

1242, 83rd Cong. 1st Sess. at-1 (1953).

A review of federal policy toward the Indians aids in understanding the court's result. The Act of June 4, 1953 and its 1957 amendment were rated in conjunction with the general shift of federal Indian policy away from a trust (guardian-ward) type of relationship toward assimilation of Indians into mainstream society. The congressional policy was one of termination of federal responsibilities over Indian affairs, including education, with the corresponding transfer of those responsibilities to the states. See generally Cohen's Handbook of Federal Indian Law, Ch. 2, § E2h at 177 (1982); Rosenfelt, Daniel M., "Indian Schools and Community Control," 25 Stan. L. Rev. 489, 500-502 (1973); H. Conc. Res. 108, 83rd Cong.

1st Sess. (1953) (congressional policy to terminate guardian-ward relationship). § 293a carried forward this policy of termination. Id. at 178; see also Senate Report No. 232 to H.R. 1242, 83rd Cong. 2d Sess. at 2 (1953) ("This proposed legislation is in line with the policy of the Department of the Interior to withdraw Federal supervision of Indians and have certain functions now administered by the Indian Bureau turned over to local people whenever feasible."). The 1960's wrought a change in federal Indian policy away from termination and toward self-determination, with renewed federal assistance if required. See generally Cohen's Handbook, supra at ch. 2, § F at 180 et seq. This change encompassed Indian education. Id. at 502 (statistically, percentage of Indian

children in state schools increases). Against this improving backdrop, the plaintiff's frustration with the use of § 293a in this case is understandable. Due to congressional inaction, a statute fostering an outdated policy toward Indian education has permitted the transfer of the Stewart school land to the state and not to the plaintiff. This court's task, however, is to properly interpret and apply § 293a, not to bypass it through result-oriented reasoning. That leaves us with a very narrow standing provision.

The Stewart Indian School land was never held in trust for any Indian or Indian tribe represented by plaintiff. Plaintiff relies for standing on the Act of January 25, 1887, ch. 11, 1887 Laws of Nevada 23-25. Section 1 provides in part:

"An Indian school, for the purpose of training and educating Indian children, is hereby established in Ormsby county ..." The Act created an Indian School Commission. Id. It authorized a bond issue, §§ 2 and 5, the proceeds of which would go toward establishing the school. § 7. The trust language upon which plaintiff rests its associational standing is found at § 8:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in trust for the benefit of such school, and in case the United States will accept of the lands so purchased and make appropriations for the support of such school, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

The problem for plaintiff is that the Indian School Commission never received any conveyance of the property at issue, in trust or otherwise, and never conveyed any lands to the United States. Exhibits 31-33 represent the conveyances, and these were from private individual or corporations to the United States in fee. The first site purchased from Mr. Wright by the Commission was not accepted by the United States (see Exs. to affidavit of Edward B. Johnson filed July 15, 1982). The subsequent accepted conveyances from Ross and Miller, et al., were directly to the United States, unrestricted, paid for by Ormsby County. The Wright lands were reconveyed to Ormsby County pursuant to act of Congress and the funds paid ($6,375.00) for the Ross-Miller, et al., lands were reimbursed to Ormsby

County by act of Congress. Reliance on the 1887 Act is misplaced.

Although not argued, we look to concurrent federal legislation which might evidence an intent on the federal government's part to take the land in trust for some specific Indian or tribe represented by plaintiff. We find no such evidence. Start-up funding for the school originated in the Indian Appropriations Act of June 29, 1988, 25 Stat. 217, 236:

> For the purpose of constructing and completing suitable school buildings for an Indian industrial school, to be located at some point in Ormsby County, in the State of Nevada, upon lands to be donated to the Government of not less than two hundred acres in extent, and of such character and location as shall be deemed most suitable for the purpose of the Secretary of the Interior, upon plans and specifications to be approved by him, twenty-five thousand dollars.

Legislation such as this which

benefits Indians is to be contrued where ambiguous in their favor. Preston v. Heckler, 734 F.2d 1359, 1369 (9th Cir. 1984). The 1888 legislation is not ambiguous -- no specific tribe or Indian is the intended beneficiary. Legislative history unfolds a concern for Nevada's Indians generally. In the 1888 Act, Congress increased appropriations for Indian schools over previous years "owing to the fact that education through various industrial schools ... is believed to be the most effective and successful mode of civilization." H. Rep. No. 1185 to H.R. 8565 at 1, 50th Cong., 1st Sess. (1888). The provision for the Stewart School entered the Act in the Senate as an Appropriations Committee amendment. See 19 Cong. Rec. at 4801, 50th Cong., 1st Sess.

(June 1, 1888). The Senate amendment, which read in part "lands previously donated to the Government," was later amended by House conferees to read "lands to be donated to the Government." That version was unltimately approved. See 19 Cong. Rec. supra at 5348 and 5373-76 (June 18, 1888). Expressing concern that the Senate amendment be concurred in by the House, Rep. Holman explained: "We have done nothing at all for these Indians in Nevada, and quite a large number of intelligent and benelovent people are interested in their education." Colloquy between Reps. Perkins and Holman, 19 cong. Rec. at 4977 (June 6, 1888). It thus appears that Congress initiated funding in 1888 for the establishment of the school as benefactor of Indian education in Nevada. This falls short of any express or implied

trust.

Plaintiff relied in oral argument on U.S. v. McGowan, 302 U.S. 535 (1938), for the proposition that despite lack of trust language in the deeds, the government held the land in trust. One cannot imagine a more inapposite case. The action sought forfeiture of cars used to carry liquor onto the Reno Indian Colony. The issue on appeal was whether, for the purpose of the forfeiture statue, the Colony was "Indian country." The court held that it was. We also note that the Eigth Circuit twenty-five years before McGowan concluded that the "setting apart of a limited tract of public domain for a school which the government devotes mainly, or even entirely, to the training and education of Indian children, attending in their

individual capacity, could not operate to convert that tract into Indian country as defined in the statute invoked by plaintiff in error." United States v. Myers, 206 Fed. 387, 394 (1913).

On December 12, 1980, Congress brought an end to whatever role the federal government assumed in 1888 in a proviso to Public Law 96-514, 894 Stat. 2957, 2968: "Provided, That no part of any appropriation to the Bureau of Indian Affairs shall be available to continue academic and residential programs of the Chilocco, Seneca, and Fort Sill boarding schools, Oklahoma; and Stewart boarding school, Nevada..." A glance at legislative history reveals the following rationale for the proviso:

Off-Reservation Boarding Schools. The Committee has approved the recommendation of the Department of Interior to close, prior to the beginning of the next school year, two off-reservation boarding schools - Fort Sill School, Oklahoma and Stewart School, Nevada. The Committee, in determining to close the schools had to make some very difficult decisions after carefully reviewing the impact of continued operation of the school facilities. The decision was not made without a thorough and careful review. In fiscal year 1979, the Committee embarked on a massive program to make the facilities operated by the Bureau of Indian Affairs, safe and well maintained. The Department completed an inventory in the summer of 1979 which indicated a backlog existed of needed maintenance and repair projects totaling $450,000,000. This figure increases at the rate of $5,000,000 a month because of inflation and $3,000,000 a month for facility deterioration. As of March 1980, the backlog is $475,000,000. The closing however, of schools such as Chilocco and Seneca has resulted in an approximately $20,000,000 reduction to the backlog. With further reduction of space which is unsafe or not fully used and control over facility needs, the backlog could be

reduced to $350,000,000. At the same time, the Committee has increased the appropriation for repair and maintenance of BIA facilities from approximately $5,000,000 annually to $21,000,000 annually as an initial step to reduce and possibly eliminate this backlog. This backlog, however, will never be eliminated unless massive and unrealistic amounts of funds are provided or unless the Bureau reduces space which is unsafe and too expensive to repair or is not used to capacity. The Committee, in making its decision on closing Fort Sill and Stewart had to consider as one factor the condition and needs of all the BIA facilities.

The Fort Sill and Stewart schools are facilities which are considered unsafe and too expensive to repair. Moreover, their students can be housed in facilities which are of higher quality and are currently grossly under used. During the last seven years, the number of students in off-reservation boarding schools - discounting turnover - has steadily decreased, from 5,822 in 1972 to 4,631 this year, a drop of 20 percent. This trend will continue as new day schools are constructed on

reservations. For example, this Committee has provided funds for at least 15 new day schools over the past few years. One of these schools, the Hopi Junior Senior High School, will reduce boarding school student population by an additional 300-400 students alone.

The Stewart Indian High School was reviewed in the summer of 1979 by the architectural firm of WBC Consultants, Inc. The firm found the facilities to be in a sad state of repair and recommended that the facility be abandoned. The firm stated that $9,300,000 in work would be required on the builidng and on site work. All buildings were in gross violation of fire safety codes. The rock-walled buildings do not meet the united (sic) buidling code structural standards and pose a real threat to the safety of the children. In addition, there is more than adequate space in other higher quality off-reservation boarding school facilities - Sherman, CA; Phoenix, AZ; Intermountain, UT; Chemawa, OR; and Flandreau, SD. Only 27 students of the approximately 400 who are currently attending Stewart reside in Nevada. The majority of the students are from Arizona and California.

H. Rep. No. 1147 to H.R. 7724 at 41-42,

96th Cong., 2d Sess. (1980); see also Sen. Rep. 985 to H.R. 7724 at 39, 96th Cong., 2d Sess. (1980). Any beneficial interest in the school property terminated when Congress determined it would no longer fund the Stewart school. See generally 76 Am.Jur.2d Trusts §§ 87-88 at 333-336 (1975).1/

Were the court empowered to assert jurisdiction over the merits of plaintiff's petition, it would refuse to declare a forfeiture of the July 21, 1982 conveyance. The only way the court could reach this alternate ground for decision is through a broad construction of the term "former beneficial owner." As discussed, any trust in the land had terminated as a result of the 1980 congressional decision to close

the school. Therefore, the consent proviso never came into play. Based on the phrase "former beneficial owner," in contrast to the consent proviso, the argument could be made that the Indian tribe petitioning for forfeiture of that conveyance might have standing if it had been a beneficial owner at some time prior to December 12, 1980, the effective date of the 1980 Act. This would ignore the obvious connection in the statute between "former beneficial owner" in the last sentence and consenting "beneficial owner" in the first proviso. "Former" refers back in the statute to a status existing immediately prior to transfer, a status key to the operation of the consent proviso. The remedy is "to vest the title in the United States, in the same trust status as previously existed."

(Emphasis added). Nevertheless, we proceed to the merits as an alternate ground for decision in the event "former" is entitled to the construction contended for by plaintiff.

The transfer agreement contains conditions which plaintiff alleges have been unobserved for a period of one year:

> The rehabilition (sic) of the Stewart Indian School Complex in Carson City, Nevada, will be done in accordance with the Secretary of Interior's, Standards for Rehabilition, (sic) a copy of which is attached and incorporated herein by reference. Rehabilitation plans will be submitted to the Nevada State Historic Preservation Officer for review and approval within a 45 -day period. The State Historic Preservation Officer will review and approve, or disapprove, such plans in writing within 45 days after receipt; if such response is not mailed within said time period, it will constitute approval.
>
> The State of Nevada shall make every reasonable effort to protect and preserve the property for the public benefit. All work on the

structures shall be done with materials and workmanship which are the same as those found in the structures originally built. If such materials are not available, materials which are similar in texture and appearance shall be used.

The State of Nevada shall undertake no action having an effect on the properties (sic) architecture of the appearance of the grounds without the prior submission of an appropriate determinatino of effect to the Nevada State Historic Preservation Officer. Such determination shall specify the nature of the proposed action, the reasons for which the action is proposed, and the anticipated effects of the action. The State Historic Preservation Officer shall be given sufficient time for a full review and comment on the proposed action, together with the opportunity to prepare an alternate course of action if the proposed action is found to be detrimental in effect. Such determination will not be required for actions that are deemed to be matters of routine maintenance and operation of the property.

Ex. 5 at p. 6.

That the property will be used for

> school or other public purposes and shall be available to Indians and non-Indians on the same terms unless otherwise approve by the Secretary.
>
> That the Grantee agrees to the continued occupancy by the Bureau of Indian Affairs of the building currently used by the Western Nevada Agency for a period not to exceed three years from the date of the conveyance. Said permit shall stipulate that the Bureau will pay a pro-rated share of all utilities, including insurance, but shall not be liable for rental costs of the building.

Ex. 5 at p.9.

> The State of Nevada wishing to prepetuate the 90-year history of the Stewart Indian School will reserve Building 1 and Building 3 to house and display the crafts, artifacts and the memorabilia relating to the Stewart Indian School. Funding for operation to be dependent upon legislative appropriation and/or private donations solicited by Nevada tribes and other interest persons.

Ex. 5 at p. 10.

Reference is made in plaintiff's trial

brief to water rights, yet no evidence whatsoever was produced at trial which would create an issue on this matter.

These conditions are a part of a contract, the construction of which is a question of law for the court. As counsel for the State stated in oral argument, the agreement was not devised in a perfect world. It is an agreement between governments. It reflects the understanding of the parties that compliance with its conditions would be subject to legislative authorization as well as appropriation from the legislature or other sources. Indeed, the determination of the public uses to which the property is to be put was intended to rest in the hands of the state legislature. This is evident in the second "whereas" clause of the quitclaim deed

(Ex.5). The finding is bolstered by the circumstances surrounding the formation of the agreement, including the State's application (Ex 41) at p.2. Construction of the commanding conditions of the contract are tempered by this recognition of the parties and their respective intentions. Substantial compliance suffices.

The nature of the conveyance is also important to interpretation. This was a transfer of a complex. The conditions are directed toward the complex as a whole. Therefore, it is of little assistance in deciding the petition to single out a few buildings (e.g., nos. 68B and 20) for analysis of compliance with the agreement. Recognizing this, we analyze compliance from a comprehensive perspective.

On a final general note, we find testimony of the dramatic demise of the

premises incredible. We have no doubt that conditions have not improved, but it is apparent that the complex as a whole was in a rather sorry condition in July of 1982. We cannot fault Congress's recognition of this in 1980 when it decided to close the school. There is no evidence of efforts of improvement between 1980 and 1982. Mr. Ellis testified to the maintenance of the structures and grounds up until transfer, but it is apparent that his pride in his work influenced his memory of well-maintained premises. Mr. Sevey's (sic) expertise on historical matters of this kind was impressive. He lived on the premises for six months between 1981 and 1982. His comparisons to today's conditions were not detailed. In 1986, he viewed the complex from the outer fence.

In 1983, he looked through some windows. He worked long in formulating an adaptive use plan which was never implemented. His comparisons appeared to the court to be based on his vision of conditions had his plan been utilized. Despite his efforts to appear an objective historian on the stand, the court sensed a strong bias toward the plaintiff's case. Lawrence Astor's testimony was unspecific except with respect to photographs (Exs. 28-28M) and 1983 inspection notes. The photographs were taken selectively and none show structural damage. The 1983 field notes (Ex. 18, attachment no. 2), to the slight extent that they are complete, discuss buildings leased, up for lease or rehabilitated.

The first three conditions quoted above are an elaboration of condition 13 of page 10 of the deed, which provides that:

> The State of Nevada recognizes that the Stewart Indian School has been declared eligible for inclusion on the Register of National Historic Places, and as such will be maintained in accordance with the National Historic Preservation Act of 1966 as amended, and applicable portions of NRS 383 relative to Historic Preservation, and also comply with State and local building codes applicable to the site.

See also 16 U.S.C. § 470 and 470-1. These are "Conditions of Transfer to ensure preservation of the historic integrity" of the complex. We do not applaud the State of Nevada for any diligence in its maintenance of the complex. Nevertheless, we cannot say that the State violated these conditions.

The first condition comes into play, by its terms, 90 days prior to any planned rehabilitation activity. Terry Sullivan testified to recent plans for rehabilitation, and indicated this condition had been complied with. He testified to the planning of rehabilitation for buildings 12, 13 and 107 as well as streets and fire prevention systems. He said these plans were approved by the State Historical Preservation Officer. There was no contradictory evidence. There is thus no evidence showing a violation of the first condition of historical preservation.

The second condition requires reasonable efforts to protect and preserve. The plaintiff would understandably prefer best efforts, but the court is unwilling to rewrite the deed. The State's efforts,

though slow to reach fruition, have been reasonable in the circumstances. The premises noted above are scheduled for rehabilitation beginning this year. Building 17 has been rehabilitated and is being partially used for college purposes. That and other structures are being leased to a federal agency which has agreed in its lease to maintain the premises in accordance with the conditions of the deed. Building 68 and Building 20 may be leased in the near future to the Geologic Survey under the same conditions. Building 89 houses the Prison Administration. One building houses battered women. Buildings 1, 3, 4 and 5 are slotted for Stewart Museum purposes, and maintenance there is subject to funding as provided in paragraph

10 (sixth condition quoted earlier) of the deed.

In light of plaintiff's claim of inaction, it is difficult to understand how it thinks the third condition ever came into play. There was testimony of emergency tree removal, but the Historical Preservation Officer approved of that action after the fact. The third condition has not been violated.

There is no evidence of discrimination to support a claim that the fourth condition has been violated. The fifth condition is moot inasmuch as the BIA evacuated the building, which has now been rehabilitated to house the prison administration. The last condition has been achieved. The court cannot control funding as contemplated by that condition.

Plaintiff lacks associational standing to petition for forfeiture. If it has standing, it has not shown a failure to satisfy the conditions of the deed that would require forfeiture. The primary resonsibility under the statute rests with the Secretary and he has not complained.

The above shall constitute the court's findings of fact and conclusions of law. Judgment shall be entered in favor of defendants.

DATED March 4, 1987.

Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

1/ The agency's conclusion that consent to transfer was unnecessary was both reasonable and consistent with § 293a. We must therefore accord that decision considerable deference. See Hart v. Bowen, 799 F.2d 567, 569 (9th Cir. 1986); Zarr v. Barlow, 800 F.2d 1484, 1486 (9th Cir. 1986).

Nor have continued appropriations for the school's operation created any relationship legally binding on the federal government. See generally Cohen's Handbook, supra at 677; Rosenfelt supra at 502.

arising under the constitution, laws, or treaties of the United States.

28 § 1361. **Action to compel an officer of the United States to perform his duty**

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 § 1362. **Indian tribes**

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the

Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

25 § 293a. **Conveyance of school properties to local school districts or public agencies**

The Secretary of the Interior, or his authorized representative, is authorized to convey to State or local governmental agencies or to local school authorities all the right, title, and interest of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such

purposes: *Provided*, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: *Provided further*,...If grantee of such land fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner, if an individual Indian or an Indian tribe, may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed.

25 § 443a. **Conveyance to Indian tribes of federally owned buildings, improvements, or facilities; disposition of property by Indians; forfeiture; definition**

The Secretary of the Interior at the request of any Indian tribe, band or group is authorized to convey to such Indian tribe, band, or group, by such means as he may deem appropriate, title to any federally owned buildings, improvements, or facilities (including any personal property used in connection with such buildings, improvements, or facilities) that are situated on lands of such tribe, band, or group or on lands reserved for the administration of its affairs, and that are no longer required by the Secretary for the administration of Indian affairs.

18 U.S.C.A. § 1151.

"... [T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

43 BIAM Supplement 2

PROPERTY AND SUPPLY/PROPERTY MANAGEMENT

Utilization and Disposal of Real Propery

11.18 Transfers Under Other Laws.

A. Conveyance of school properties to local school districts of public agencies (Public Law 47 - 83rd Cong.). Under the provisions of the Act of June 4, 1953 (67 Stat. 41), as amended, the Secretary of the Interior, or his authorized representative, may convey to State or local governmental agencies or to local school authorities all the right, title, and interest of the United States in any land and improvements thereon and personal property used in connection therewith, heretofore or hereafter used for Federal Indian School purposes and no

longer needed for such purposes and no longer needed for such purposes (sic)....

(1) General Procedures. Proposed transfers of school properties should be well planned and discussed among the Area, Agency, tribal and local school officials. In the following order, each step shall be completed before submitting the proposed plan to the central Office, Attention: Property Mangement, for approval.

(2) The Area Director shall first determine whether the transfer is in the best interest of the Government, and in accord with Bureau programs and objectives, and authorized by the Act as amended.

(3) Having made this determination in the afirmantive (sic), the Area Director shall obtain from the authorized

representatives of the proposed transferee written evidence in the form of a letter of application which must establish the following:

(a) The eligibility of the transferee as (an instrumentality of) a State or local governmental agency or local school authority.

(b) Designation of a specifi (sic) official with whom negotiations are to be prosecuted.

(c) An identification of a legal entity to receive the property for use in preparing transfer instruments accurately.

(d) The application is being made for the property under the provisions of the Act of June 4, 1953, (67 Stat. 41) as amended.

(e) A statement of the need for

the property, suitability of the property for the proposed use, and the financial ability of the applicant to maintain and operate the property for its program and in accordance with the minimum standards required by applicable State or local law.

(f) A complete statement as to the program of utilization, including salvage or conversion plans, a justification for the need for all of the acreage in any land requested and for the need for specific buildings and other improvements.

(g) A description of the property applied for (including related personal property) in as full detail as is practicable.

(h) A reference to the applicant's authority to, and a statement

that is agreeable to assume immediate care and custody and maintenance of the property.

THIRTEENTH SESSION

Chap. XII. -- *An Act to establish and provide for an Indian school*

[Approved January 25, 1887]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. An Indian school, for the purpose of training and educating Indian children, is hereby established in Ormsby county, and H. M. Yerington, Jowett W. Adams and S. L. Loe are hereby appointed a commission for the purposes hereinafter named, to be known as "The Indian School Commission."

...

SECTION 8. All lands purchased under the provision of this Act shall be conveyed

to said Indian School Commission in trust for the benefit of such school, and in case the United States will accept of the lands so purchased and make appropriations for the support of such school, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

SEC. 9. The jurisdiction of this State is hereby ceded to the United States over all parts and parcels of land conveyed to the United States under the provisions of this Act, or selected by the United States for the purposes of the Indian school herein provided for, and all

property used for the purposes of such school, whether the same be conveyed to the United States or not, shall forever be and remain free from taxation by this State; *provided*, that the jurisdiction over said land is hereby retained by the State of Nevada for the purpose of the service of all writs and process thereon.

SEC. 10. The faith of the State of Nevada is hereby solemnly pledged that this Act shall never be repealed, or no part modified in any way as to impair the security of those who shall hold or purchase the bonds herein provided for.

5 § 701 The Agencies Generally

CHAPTER 7 - JUDICIAL REVIEW

§ 701 Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United

States;

(C) the governments of the terriotories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622,

1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meanings of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor

relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injuctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 704. Actions reviewable

Agency action made reviewable by statue and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory providisons, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

is making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Supreme Court, U.S.
FILED
JUL 19 1989
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CLERK

No. 88-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERTRIBAL COUNCIL OF NEVADA, INC.,
Petitioner,

v.

DONALD HODEL, individually and as Secretary of the Interior of the United States of America, and THE STATE OF NEVADA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT STATE OF NEVADA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Inter-Tribal Council of Nevada, Inc. ("the Council") or any of its member tribes were "former beneficial owners" with standing to seek the forfeiture of the conveyance of the Stewart Indian School site to the State of Nevada ("State") under 25 U.S.C. § 293a or review of the conveyance under the Administrative Procedure Act, 24 U.S.C. § 702?

2. Whether the Council has properly stated or otherwise shown it has standing to assert a claim under 25 U.S.C. § 443a?

LIST OF PARTIES

The Petitioner has adequately described the parties.

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No. 88-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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Petitioner,

v.

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Respondents.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately described the Opinions Below, the jurisdiction of this Court, and the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

A. Nature of the Case.

The State agrees with the Council's statements with respect to the nature of this case but adds that in none of the Complaints filed by the Council is there a specific reference to a claim being asserted under 25 U.S.C. § 443a.

B. Summary of Proceedings Before the District Court.

The State agrees with most of the Council's statements with respect to the summary of the proceedings before the district court; however, the quotation from the district court's memorandum opinion and order entered on September 26, 1984, addressing the standing issue should be placed in the following context.

In its ruling on the respondents' motions to dismiss petitioner's second amended complaint, the district court

stated:

> At the hearing on the motion for a preliminary injunction the Court concluded that the plaintiff was not the "beneficial owner" and was not an "indian [sic] tribe" within the meaning of 25 U.S.C. § 293a. After further reflection the court believes this conclusion was probably erroneous and the plaintiff Inter-Tribal Council should be considered to be the appropriate representative of the Indian tribes, if any, deemed to be the beneficial owners of the Stewart Indian School property. Therefore, the plaintiff has standing to represent the rights of the Indians or Indian tribes in any litigation within the jurisdiction of this court. Great Lakes Inter-Tribal Council, Inc. v. Voight, 309 F.Supp. 60 (W.D.Wis. 1970)

Petitioner's Appendix C at 20a-21a. The district court then granted the motions to dismiss and granted petitioner leave to file an amended complaint naming the Secretary of the Interior and the State of Nevada as the sole parties defendant and stating a claim for relief under 25 U.S.C. § 293a.

The district court's memorandum opinion entered on March 10, 1987, Petitioner's Appendix D at 32a-33a, addressed its earlier comments on the issue of standing:

> Plaintiff lacks associational standing to petition for forfeiture because its members would not have standing to sue in their own right. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342 (1977). The earlier order simply indicated that standing was plead adequately. Plaintiff failed to prove standing at trial.

C. Statement of Facts Relevant to the Issues.

The State agrees with most of the Council's statements with respect to its statement of facts relevant to the issues. In the interest of accuracy and completeness, however, the State adds the following facts.

The district court never specifically found as fact Petitioner's assertion that:

> [I]n September, 1981, in a meeting among representatives of the Nevada Indian tribes, the Nevada Congressional delegation and then Deputy Secretary Roy Sampsel, it was announced that as between the State of Nevada and the Nevada Indian tribes, the Stewart Indian School property would be awarded to whoever submitted the best adoptive use plan.

Petition for Writ of Certiorari at 9. This statement remains merely a contention of the Petitioner.

The Petitioner omits relevant details regarding the establishment in 1888 of the Stewart Indian School and the conveyance whereby the United States acquired title to the site. Title to the property was never held by the Indian School Commission created by the Act of January 25, 1887, 1887 Nev. Stat. ch. XII. Nor was title conveyed to the United States from the Commission in trust for the benefit of the school as required by section 8 of the Act. Title was conveyed to the United States by the

private, non-Indian owners in fee simple with no language creating a trust or beneficial interest in any other party or group.

The Petitioner also omits relevant details regarding the closure of the school in 1980. That action was the result of Congress' decision to cut off funding for the school after determining that it was unsafe and too expensive to repair. At that time, only 27 students of the approximately 400 who were attending the school were Nevada residents; the majority of the students were from Arizona and California. At the time of the conveyance of the property to the State in July of 1982, the Stewart Indian School had been closed for some two years.

SUMMARY OF ARGUMENT

The Stewart Indian School site was never set aside by treaty, statute or

conveyance as Indian land. There are no conflicting authorities on the issue of whether the site may properly be considered a "dependent Indian community" under 18 U.S.C. § 1151(b). The lower courts properly found that neither the Council nor its members were "former beneficial owners" of the site under 25 U.S.C. § 293a. The Council therefore lacks standing to challenge the transfer or seek review of an alleged violation of the Bureau of Indian Affairs Manual implementing the provisions of 25 U.S.C. § 293a.

The Council failed to plead or rely in district court on the provisions of 25 U.S.C. § 443a. In any event, the evidence clearly shows that the site was not set aside for the administration of the Council's affairs.

REASONS FOR DENYING THE PETITION

I. There is no conflict of authority as to whether the Council or any of its members are former beneficial owners under 25 U.S.C. § 293a.

The Council urges this Court to grant certiorari because of a purported conflict between the courts' rulings in United States v. Meyers, 202 F.2d 387 (8th Cir. 1913), cited by the district court in support of its conclusion that attendance by individual Indians at the school did not convert the site to Indian country, and C.M.G. v. State, 594 P.2d 798 (Okla. 1979). In C.M.G., the court concluded that an Indian school located on land specifically reserved for "the settlement of friendly Indians" was Indian country in which the State of Oklahoma had no criminal jurisdiction. The court found no conflict and believed Meyers to be distinguishable on its facts.

In C.M.G., the court noted that, while it was used as an Indian school, the land in Meyers had not been reserved for the use of Indians when it was acquired by the United States. C.M.G., 594 P.2d at 801-802. Rather, the site had been reserved to benefit the territory and future state of Oklahoma. Meyers, 206 F.2d at 392.

In addition to the fact that neither case discussed the existence of an "implied trust," the present case is closer to the facts of Meyers. The Council concedes that no express trust was created in favor of the Council, its members, or any other group of Indians. The United States received title in fee simple directly from non-Indian owners. Despite the Council's assertions to the contrary, the conveyance was not made in accordance with the old Nevada statute, Act of January 25, 1887, 1887 Nev. Stat.

ch. XII, creating the Indian School Commission, because title was never acquired or held, in trust or otherwise, by the Commission.

Even if a trust had been implied by virtue of the Nevada statute, it did not contemplate a trust for the benefit of the Council, or a particular Nevada tribe, or the Nevada Indian population in general. If the title had been held by the Indian School Commission, it would have been held for the benefit of the school, not the Council or any of its members.

The Council's argument with respect to the definition of "Indian Country" is misplaced. The lower courts did not refuse to address this issue but rather concluded that, based upon the circumstances, the Council could not be considered the "former beneficial owner" of the site under 25 U.S.C. § 293a. The

record simply does not support the conclusion that the site had been validly set aside for any Indian or Indian tribe represented by the Council.

Cases cited by the Council for the proposition that Indian country need not inure to the benefit of a single tribe or named tribe do not address the definition of "former beneficial owner" under 25 U.S.C. § 293a. A finding that the school was Indian country for purposes of criminal jurisdiction would not compel the conclusion that the Council or its members were former beneficial owners of the site. In addition to the fact that the government never expressly held the site in trust for the Council or its members, several additional circumstances exist which negate such an intention. In 1980, Congress unequivocally expressed its intention to relinquish whatever role it had previously played with respect to

the operation of the Stewart Indian School by terminating all funding. At that time, only 27 of the approximately 400 students attending resided in Nevada. Even if Nevada Indians, whose children represented only 6.75% of the school's population, could in 1980 properly be considered the sole beneficiaries of any trust established for the benefit of the school, such a claim could not be made some two years later when the site was conveyed to the State of Nevada because it was then no longer dedicated for or used as an Indian school. The mere presence of a group of Indians in a particular area does not establish a dependent Indian community under 18 U.S.C. § 1151. State v. Cutnose, 532 P.2d 896, 898 (N.M. 1974); see also Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

II. The Council has not asserted or otherwise shown it has standing to assert a claim for relief under 25 U.S.C. § 443a.

The Council's belated attempt to argue the application of 25 U.S.C. § 443a should fail simply because it never attempted to state a claim for relief under this provision in any of its complaints or to pursue any available administrative remedies. Inter-Tribal Council of Nevada, Inc. v. Hodel, 856 F.2d 1344, 1348, 1352 n.1 (9th Cir. 1988). The Council improperly attempted to supplement the record on appeal before the Court of Appeals with respect to this issue and clearly had not relied on this ground in the district court.

Moreover, it is difficult to understand the Council's position that the Indian School site had been "reserved for the administration of its affairs" under § 443a when its argument with respect to

25 U.S.C. § 293a relies upon the site's purported dedication and use as an Indian school.

The Council fails to explain how the possible use of only one building for administrative purposes out of the many in the school complex could change the character of the site as a whole. The Court of Appeals found, and the record clearly supports the conclusion, that the Stewart School site was never set aside by treaty or statute as Indian land. The land was purchased for use as a school serving students from all over the western United States, primarily Arizona and California. Whatever the use permitted for one building, the site was not reserved for the administration of the affairs of the Council's members and the Council therefore has no standing under § 443a to protest the transfer of the land to the State of Nevada.

III. The Council has no standing under the Administrative Procedure Act to request review of the alleged violation of the Bureau of Indian Affairs Manual.

The portion of the Bureau of Indian Affairs Manual allegedly violated by the Secretary of the Interior in its transfer of the school site to the State of Nevada implements the provisions of 25 U.S.C. § 293a. Since the Council has failed to show standing to challenge the transfer under § 293a, it similarly cannot show that any violation of the Bureau of Indian Affairs Manual resulted in any injury in fact to its interests for which it would have standing to seek review under the Administrative Procedure Act.

In addition, even if the Council could show standing, a question remains as to whether it would be barred from judicial relief for failure to exhaust administrative remedies. Neither the complaint nor the briefs represent that

the Council made any attempt to seek administrative review of the transfer decision or procedures of the Bureau of Indian Affairs, or that a procedure for such review was unavailable. Inter-Tribal Council of Nevada, Inc. v. Hodel, 856 F.2d 1344, 1352 n.1 (9th Cir. 1988).

CONCLUSION

The Stewart Indian School site was never set aside by treaty, statute or conveyance as Indian land. A trust in which the Council or its members are sole beneficiaries cannot be implied under the circumstances of this case, where only a small percentage of the Council's members attended the school which was permanently closed in 1980, some two years prior to the challenged transfer. Since neither the Council nor its members are former beneficial owners, it has no standing to seek a forfeiture of the transfer under 25 U.S.C. § 293a, or judicial review of

an alleged violation of the Bureau of Indian Affairs Manual under the Administrative Procedure Act.

Since the Council failed to allege a claim under 25 U.S.C. § 443a in its complaint, it should not be permitted to raise the issue for the first time on appeal. In any event, the evidence demonstrates that the school site was not reserved for the administration of the Council's or its members' affairs. The Council therefore lacks standing to assert a claim under 25 U.S.C. § 443a.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-1947

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTER-TRIBAL COUNCIL OF NEVADA, INC., PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has standing to seek forfeiture of land, previously used for a federal Indian school, that the United States has conveyed to the State of Nevada.

2. Assuming that the petitioner has standing to sue, whether the State of Nevada violated the conditions to conveyance.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 856 F.2d 1344, and the opinion of the district court dismissing the second amended complaint (Pet. App. 19a-27a) is reported at 592 F. Supp. 1297. The final opinion of the district court (Pet. App. 28a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988, and a petition for rehearing was denied on December 21, 1988 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the Secretary of the Interior's decision to transfer land once used for the Stewart Indian School to the State of Nevada pursuant to the provisions of 25 U.S.C. 293a. The district court held that petitioner lacked standing to challenge the Secretary's action and that even if the petitioner had standing, it would not be entitled to relief. The court of appeals affirmed.

1. In 1887, the Nevada legislature created an Indian School Commission and authorized the establishment of an Indian School in Ormsby County. Act of Jan. 25, 1887, 1887 Nev. Stat. ch. XII. The legislature further provided:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in trust for the benefit of such school, and in case the United States will accept of [*sic*] the lands so purchased and make appropriations for the support of such school, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

1887 Nev. Stat. ch. XII, § 8 (Pet. App. 72a-73a).

In 1888, the Indian School Commission purchased a 200-acre tract that it believed the United States could use as an Indian school site, and it accordingly executed the deed in favor of the United States. The Secretary of the Interior determined, however, that the land was unsuitable for a school site and refused to accept the deed. Shortly thereafter, the Secretary purchased a different tract, using county funds, through an unrestricted deed conveying the land from private parties directly to the United States in fee simple. Congress appropriated $25,000 for the establishment of the Stewart Indian School (Indian Appropria-

tions Act of June 29, 1888, ch. 503, § 1, 25 Stat. 236) and later reimbursed the county for the purchase price of the site. See Pet. App. 5a-6a, 37a-40a.

The United States maintained this site as the Stewart Indian School until 1980. That year, Congress determined that the school facilities were unsafe and that the needs of the 400 students attending the school (of whom only 27 were from Nevada) could be met at other facilities. Congress therefore closed the school. Act of Dec. 12, 1980, Pub. L. No. 96-514, 94 Stat. 2968. See H.R. Rep. No. 1147, 96th Cong., 2d Sess. 41-42 (1980). The State of Nevada and petitioner thereafter separately requested to receive the land pursuant to 25 U.S.C. 293a, which permits the Secretary of the Interior to transfer unneeded Indian school property to state or local governments. Pet. App. 6a-7a, 44a-48a.

On April 22, 1982, Nevada filed its application for transfer of the Stewart Indian School site under Section 293a, and on May 4, 1982, petitioner submitted an application for the site on behalf of the Nevada Indian tribes. The Secretary of the Interior informed petitioner that Section 293a did not permit transfer of the site to its organization. Pet. App. 6a-7a. On June 10, 1982, after the Secretary had proposed transferring the site to Nevada, petitioner filed a complaint seeking to enjoin the proposed conveyance. The complaint asserted that the land was held by the United States in trust for Nevada's Indians and that the Secretary had failed to comply with Section 293a's requirement that the United States obtain the consent of these "beneficial owner[s]" of the land prior to conveyance.[1] The complaint also contained a claim under the

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[1] Section 293a provides that "the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the

Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, based on the Secretary's alleged failure to follow the provisions of the Bureau of Indian Affairs (BIA) Manual dealing with Section 293a transfers. Pet. App. 9a.

2. The district court denied petitioner's motion for a preliminary injunction and the property was transferred to the State of Nevada in July 1982 (Pet. App. 8a, 9a). Petitioner then amended its complaint to add a cause of action under Section 293a's forfeiture provision, contending that the land should be returned to the United States because Nevada had failed to comply with the terms and conditions of transfer contained in the quitclaim deed (Pet. App. 9a).[2] The district court dismissed all of petitioner's claims except for the forfeiture action (*id.* at 19a-27a). Following trial on that action, the district court entered judgment for the Secretary and the State of Nevada, holding that petitioner lacked standing to seek a forfeiture because it was not a "former beneficial owner" (25 U.S.C. 293a) of the Stewart Indian School site. The district court ruled, in the alternative, that Nevada reasonably had complied with the terms and conditions of transfer. Pet. App. 28a-61a.

The court of appeals affirmed (Pet. App. 1a-17a). It agreed with the district court that petitioner lacked standing to sue under Section 293a's forfeiture provision because petitioner had not proved that it (or any of its con-

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United States in trust for an individual Indian or Indian tribe" (25 U.S.C. 293a).

[2] Section 293a provides in relevant part that if a grantee of land conveyed under that provision "fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner * * * may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed" (25 U.S.C. 293a).

stituent members) was a "former beneficial owner" of the land (Pet. App. 12a-14a). The court of appeals also ruled that petitioner lacked standing under 25 U.S.C. 443a, which permits the Secretary to transfer federally owned facilities to Indian tribes if such facilities "are situated on the lands of such tribe, band, or group or on lands reserved for the administration of its affairs * * *." The court concluded that the Stewart Indian School site had not been reserved for petitioner or its member tribes or for the administration of their affairs (Pet. App. 14a-15a).[3]

Finally, the court of appeals held that petitioner lacked standing to assert a challenge under the APA based on the Secretary's supposed failure to comply with agency procedures set forth in the BIA Manual for transfers of land pursuant to 25 U.S.C. 293a. The court concluded that since petitioner "has no rights protected by § 293a, it has no standing to protest the Secretary's alleged failure to properly implement that statute" (Pet. App. 15a-17a). In view of its decision on the standing issues, the court of appeals found it unnecessary to review the district court's determination that Nevada had reasonably complied with the terms of the quitclaim deed for the Stewart Indian School site (*id.* at 17a).

ARGUMENT

The court of appeals correctly concluded that petitioner has no legally cognizable interest in the Stewart Indian School land and therefore lacks standing to seek its for-

[3] The court of appeals observed that "[a]lthough an examination of the various complaints filed by [petitioner] does not reveal that it ever asserted a cause of action under section 443[a], we will nevertheless discuss this possibility because the record indicates that [petitioner] relied upon the section in its opposition to the federal defendants' motion to dismiss" (Pet. App. 10a).

feiture. The decision does not conflict with any decision of this Court or of any other court of appeals. Further review, accordingly, is not warranted.

1. Petitioner argues (Pet. 17-27) that it has standing to seek forfeiture of the Stewart Indian School land pursuant to Section 293a because petitioner and its members are "former beneficial owner[s]" (25 U.S.C. 293a) of that land. Petitioner reasons that the Nevada statute creating the Indian School Commission and authorizing the purchase of Indian school lands (see p. 2, *supra*) imposed an "implied trust" on the Stewart Indian School site for the benefit of petitioner and its members. The court of appeals correctly rejected that contention.

The Nevada statute states that "lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in trust for the benefit of such school" (p. 2, *supra*). As the court of appeals explained (Pet. 12a-14a), the land at issue here was not purchased under "this Act" and, accordingly, was never "conveyed to said Indian School Commission." The United States itself purchased the land in fee simple. Thus, no implied trust was created under the terms of the Nevada legislation. Indeed, even if an implied trust had been created, the Nevada statute does not designate petitioner or its members as beneficiaries of the trust. Instead, the trust would have been created "*for the benefit of such school.*" Thus, petitioner's argument that it and its members may seek forfeiture as "former beneficial owner[s]" is without mert.[4]

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[4] Petitioner also mistakenly argues (Pet. 19-27) that it is a "former beneficial owner" because the Stewart Indian School is "Indian country" within the meaning of 18 U.S.C. 1151. Section 1151, which defines "Indian country" for the purpose of federal criminal jurisdiction, has no relevance to the present dispute.

Petitioner also contends (Pet. 27-38) that it "has standing to pursue this action under 28 U.S.C. § 1331, 1362 and 25 U.S.C. § 443a." Sections 1331 and 1362 are provisions defining the jurisdiction of the federal district courts and do not, of course, confer standing. Section 443a, which permits the Secretary of the Interior to transfer to an Indian tribe "federally owned buildings, improvements, or facilities" in prescribed circumstances, is also inapposite.

As the court of appeals observed (Pet. App. 10a), petitioner's various complaints have never stated a claim based on Section 443a. In any event, Section 443a permits, but does not compel, the Secretary to transfer to an Indian tribe federal *facilities* which are no longer used by the federal government if those facilities are located on "lands of such tribe, * * * or on lands reserved for the administration of its affairs" (25 U.S.C. 443a). The court of appeals correctly recognized that the Stewart Indian School site "was never set aside by treaty or statute as Indian land" (Pet. App. 15a) and that it was not "reserved for the administration of the affairs of [petitioner's] member tribes" (*ibid.*). Indeed, the school's student body was composed principally of out-of-state students (*id.* at 13a). Thus, Section 443a does not give petitioner standing to challenge the transfer of the school facilities, let alone the underlying land.

Petitioner also contends (Pet. 38-46) that it has standing under the APA to challenge the Secretary's alleged failure to comply with the provisions of the BIA Manual. The court of appeals properly rejected that contention. The APA permits challenges to agency decisions by persons who have suffered legal wrong because of the agency action or who have been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. The BIA Manual sections that petitioner alleges the Secretary has violated implement Section 293a.

"Because [petitioner] has no rights protected by § 293[a], it has no standing to protest the Secretary's alleged failure to properly implement that statute" (Pet. App. 17a). Indeed, "[e]ven if the Council had surmounted the standing barrier, which it has not, there is a question whether it would still be barred from judicial relief for failure to exhaust administrative remedies" (*id.* at 17a n.1).

2. Petitioner also asks this Court to review the district court's alternative holding that petitioner failed to carry its burden under Section 293a's forfeiture provision of showing that Nevada had violated the provisions of the transfer agreement. The district court concluded that the trial testimony showed that Nevada had made reasonable efforts to protect and preserve the property. That question, which the court of appeals found unnecessary to address (Pet. App. 17a), turns on the particular facts of the case and would not warrant this Court's review even if petitioner had standing to raise it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

INTERTRIBAL COUNCIL OF NEVADA, INC.,
Petitioner

v.

MANUEL LUJAN, JR., individually and as Secretary of the Interior of the United States of America, and THE STATE OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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QUESTIONS PRESENTED

1. Whether the Inter-Tribal Council of Nevada, Inc. (the Council) has standing to demand petition for forfeiture of the Stewart Indian School lands because the Council and its individual member tribes are former beneficial owners under 25 U.S.C. § 293a.

2. Whether the Council has standing to pursue this action under 28 U.S.C. § 1331, 1362 and 25 U.S.C. § 443a.

3. Whether the Council has standing under the Administrative Procedure Act 25 U.S.C. § 702 to request review of a violation of the Bureau of Indian Affairs manual.

4. Whether the State of Nevada has voliated the conditions of transfer.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER IN REPLY

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra, 1a - 16a) is reported at 856 Fed.2d 1344 (9th Cir. 1988). The opinions of the district court (Appendix C, infra, 18a - 22a) 592 F.Supp. 1297 (1984)

and Appendix D, infra, 23a - 41a.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988. Petition for rehearing was denied on December 21, 1988. (Appendix B, infra 17a) The petition for rehearing was timely filed pursuant to Rule 20.4. The time for filing a Petition for Writ of Certiorari is 90 days from the date of denial of the petition for rehearing, which was December 21, 1988, and therefore the Petition for Writ of Certiorari is due on March 20, 1989. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21(f) the statutory provisions involved are cited below and their pertinent text is set forth in Appendix E (infra, 42a - 55a).

1. 5 U.S.C. § 701, 702, 704, 706.

2. 25 U.S.C. § 293a, 443a.

3. 28 U.S.C. § 1331, 1362

4. 18 U.S.C. § 1151

5. 43 B.I.A.M., Supplement § 11.19

6. Nevada Legislative Act of 1887.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE PETITION

1. There is a conflict of authorities as to whether the Council or any of its members are former beneficial owners under 25 U.S.C. § 293(a).

A review of the record shows clearly that the facts are analogous to C.M.J. v. State, 594 P.2nd 798 (Okla. 1979). The lands in this case were clearly set aside for an Indian school, not for a public school as they were in U.S. v. Meyer, 202 Fed.2d 387 (8th Cir. 1913).

It can't be ruled out that the Indian school in this case was indeed Indian

country, and as such was held in trust for the Indian population that was benefitted, which included Nevada Indian tribes as well as other Indian tribes that used the school.

II. The Council has asserted and shown it has standing to assert a claim for relief under 25 U.S.C. § 443(a).

For the reasons stated in its petition and below, the Council clearly relied on 25 U.S.C. § 443(a) in this lawsuit, but because of the decision of the district court was not permitted to pursue its legal argument at trial.

III. The Council has standing under the Administrative Procedure Act to request a review of the alleged violation of the Bureau of Indian Affairs Manual.

It is the position of the Council that the action taken under the Administrative Procedure Act is independent of 25 U.S.C.

293(a). However, if the court concludes that the Administrative Procedure Act does not give an independent basis to review a violation of the BIAM, the Council clearly has standing under 25 U.S.C. 293(a). Not only is it the group of tribes that were former beneficial owners, but they are a competing local government that should be entitled to a transfer of lands the same as the State of Nevada.

ARGUMENT IN REPLY TO RESPONDENTS' STATEMENT OF FACTS RELEVANT TO THE ISSUES

The federal and the state respondents in their respective briefs in opposition state that the Council failed to plead or rely in district court on the provisions of 25 U.S.C. § 443(a). State's brief, page 7; federal brief, page 7.

This is clearly an incorrect statement of fact. A review of the record in this case demonstrates that the Council was

relying on 25 U.S.C. § 443(a) as well as 25 U.S.C. § 293(a). 43 BIAM Supplement 2, Section 11.19, the regulations interpreting 25 U.S.C. § 443(a) were attached a Exhibit "E" to the Council's Application for Preliminary Injunction, filed June 10, 1982. (CR 3, CR 10, CR 12)

In the complaints filed in district court, the Council alleged that the Secretary of the Interior could have transferred the site to it under 25 U.S.C. § 293(a), 25 U.S.C. § 465, and 25 U.S.C. § 467, as well as other federal statutes and regulations not enumerated. (CR 1 at 7, para. 20; CR 30 at 7, para. 20; CR 47 at 6, para. 20). Other federal statutes not enumerated included 25 U.S.C. § 443(a), because at the time the complaint was filed the attorney for the Council was not aware of the basis on which the Council had filed its originial application.

The council clearly raised the issue of the application of 25 U.S.C. § 443(a) in its opposition to the State's and the federal motions to dismiss (CR 41, filed January 26, 1984; CR 43, filed March 14, 1984).

The argument raised by the Council in its opposition was denied by the district court in its memborandum opinion dated September 21, 1984 (CR 46) where the court limited the trial to the cause of action under 25 U.S.C. § 293(a).

The State also argues the Council omitted details regarding the closure of the school in 1980, and that Congress decided to cut off the funding for the school after determining that it was unsafe and too expensive to repair. However, the facts brought out during the trial show that the federal government has funded most of the repairs to the school since its

closure, and, in fact, determined to lease the school back from the State. Clearly the stated purpose for closing the school was contrary to the facts as demonstrated during the trial in this case.

CONCLUSION

A review of the facts in this case shows an arbitrary and capricious decision by the Bureau of Indian Affairs. Not only has the Bureau breached its trust responsibility by ignoring the Council's application under 25 U.S.C. § 443(a), it has acted in complete disregard of Congress. It was supposed to close the Stewart Indian School in order to save the tax payers money.

The Bureau then gave away the Indian school in violation of its own rules, as established in its manual, and has failed to ensure that the State of Nevada lived up to the conditions of the transfer.

For these reasons, the court of appeals' decision should be reversed; the transfer of the Stewart Indian school lands should be forfeited; and title should be restored to the federal government.

The federal government should then fairly evalutate the competing applications of the Indian tribes and the State of Nevada, making a determlination based on the facts as to who is best prepared to protect and preserve this national historic monument. It would a travesty to the Indian people of this nation if the State of Nevada were able to continue on its present course of conduct and allow the Stewart Indian School to deteriorate any further.

Respectfully submitted.

Peter J. Sferrazza

AUGUST 15, 1989